United Nations A/69/272

General Assembly

Distr.: General
7 August 2014

Original: English

Sixty-ninth session
Item 69 (b) of the provisional agenda*
Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms

Promotion of a democratic and equitable international order

Note by the Secretary-General

The Secretary-General has the honour to transmit to the General Assembly the interim report of the Independent Expert on the promotion of a democratic and equitable international order, Alfred-Maurice de Zayas, submitted in accordance with Assembly resolution 68/175.

* A/69/150.

14-58886 (E) 200814

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Interim report of the Independent Expert on the promotion of a democratic and equitable international order

Summary

The present report is the Independent Expert's third to the General Assembly and is submitted pursuant to paragraph 19 of Assembly resolution 68/175. It supplements previous reports to the Assembly and the Human Rights Council on other aspects of the mandate and focuses on the implementation of the right of self-determination as key to the international order envisaged by the Charter of the United Nations and a constitutive element of Council resolution 18/6. Bearing in mind that over the past decades many conflicts were related to the denial of self-determination, the report explores the vision that the universal realization of self-determination will contribute to greater enjoyment of human rights, peace and stability as envisaged in Article 1 (2) of the Charter. The Independent Expert acknowledges the need to balance competing rights and interests in the spirit of the Charter and proposes criteria to facilitate an understanding of the various manifestations of self-determination.

I. Introduction

1. In its resolution 68/175, the General Assembly took note of the major changes taking place on the international scene and the aspirations of all peoples for an international order based on the principles enshrined in the Charter of the United Nations, including promoting and encouraging respect for human rights and fundamental freedoms for all and respect for the principle of equal rights and self-determination of peoples, peace, democracy, justice, equality, the rule of law, pluralism, development, better standards of living and solidarity. Bearing in mind that all States have a legal obligation to observe the purposes and principles of the United Nations and work to strengthen its three pillars — peace, development and human rights — the present report builds on paragraph 5 of resolution 68/175, in which the Assembly affirmed that a democratic and equitable international order required the realization of, among other things:

(a) The right of all peoples to self-determination, by virtue of which they can freely determine their political status and freely pursue their economic, social and cultural development;

(b) The right of peoples and nations to permanent sovereignty over their natural wealth and resources;

(c) The right of every human person and all peoples to development;

(d) The right of all peoples to peace.

2. In this connection, the Independent Expert has given attention to General Assembly resolution 68/153 and to the report of the Secretary-General on self-determination (A/68/318), which recognize that universal realization of self-determination is a fundamental condition for the effective guarantee and observance of human rights. He further acknowledges the study on the impacts of the Doctrine of Discovery on indigenous peoples, including mechanisms, processes and instruments of redress, submitted to the Permanent Forum on Indigenous Issues, in which special rapporteurs are encouraged to play a role in establishing relevant standards (E/C.19/2014/3, para. 36). Since 2012, the Independent Expert has received an increasing number of appeals and communications from stakeholders concerning self-determination issues.[1]

3. In its essence, the right of self-determination means that individuals and peoples should be in control of their destinies and should be able to live out their identities, whether within the boundaries of existing States or through independence. More than an outcome, self-determination should be seen as a process subject to revision and adjustment, and its outcome must correspond to the free and voluntary choice of the peoples concerned,[2] within a framework of human rights protection and non-discrimination. Self-determination cannot be understood as a one-time choice, nor does it extinguish with lapse of time because. Like the rights to life, freedom and identity, it is too fundamental to be waived. As an ongoing democratic

[1] Including at the expert consultations convened by the Independent Expert in Geneva in May 2013 and in Brussels in May 2014, at which representatives of the Indigenous Peoples and Nations Coalition, the Indian Council of South America, representatives of Australian Aborigenes and the International Human Rights Association of American Minorities spoke.

[2] International Court of Justice, *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 12.

exercise, self-determination entails a people's equal participation[3] in decision-making, a continuous dialogue by virtue of which parties adjust and readjust their relationship for mutual benefit. It can be exercised at various levels, from enhanced empowerment, regional autonomy and federalism to secession. When populations are disenfranchised and cannot exercise their cultural identities, tensions may increase, culminating in armed conflict, the outcome of which might be their military success and consequent independence, or their defeat and decimation. The process did not end with decolonization, with the dissolution of the Soviet Union and Yugoslavia, or with the independence of South Sudan. It continues today as many minorities, indigenous peoples and peoples living under occupation strive to achieve higher degrees of self-administration and self-government. The international community should develop strategies to facilitate early warning and assist States in devising timely solutions.

4. At the outset, it is useful to clarify that the rights holders of self-determination are peoples, a concept that has never been conclusively defined, notwithstanding its frequent use in United Nations forums. Participants at a UNESCO expert meeting on self-determination endorsed what has been called the "Kirby definition",[4] recognizing as a "people" a group of persons with a common historical tradition, racial or ethnic identity, cultural homogeneity, linguistic unity, religious or ideological affinity, territorial connection, or common economic life.[5] To this should be added a subjective element: the will to be identified as a people and the consciousness of being a people. A people must be numerically greater than just "a mere association of individuals within the State".[6] Their claim becomes more compelling if they have established institutions or other means of expressing their common characteristics and identity. In plain language, the concept of "peoples" embraces ethnic, linguistic and religious minorities, in addition to identifiable groups living under alien domination or under military occupation, and indigenous groups who are deprived of autonomy or sovereignty over their natural resources.

5. Duty bearers of the right of self-determination are all States Members of the United Nations, who must recognize and promote this right, individually and collectively, pursuant to *erga omnes* provisions of the Charter and human rights treaties. Empowerment of peoples to enjoy human rights without discrimination and to exercise a degree of self-government is crucial for national and international stability. Otherwise, a significant potential for conflict remains.

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[3] See Human Rights Council resolution 24/8.

[4] Michael Kirby, speech delivered at the UNESCO International Meeting of Experts on Peoples' Rights and Self-Determination", Budapest, 25-29 September 1991. Available from www.michaelkirby.com.au/images/stories/speeches/1990s/vol24/906-Peoples'_Rights_and_Self_Determination_-_UNESCO_Mtg_of_Experts.pdf.

[5] See M. van Walt and O. Seroo, eds., "The implementation of the right to self-determination as a contribution to conflict prevention: report of the International Conference of Experts held in Barcelona from 21 to 27 November 1998", UNESCO Centre of Catalonia, 1999. Available from www.unpo.org/downloads/THE%20IMPLEMENTATION%20OF%20THE%20RIGHT%20TO%20SELF.pdf).

[6] UNESCO, "International meeting of experts on further study of the concept of the rights of peoples: final report and recommendations", 1989, UNESCO document SHS-89/CONF.602/7, p. 8. See also the definition of indigenous peoples proposed by José Martínez Cobo in the conclusions and recommendations of his *Study of the Problem of Discrimination against Indigenous Populations* (United Nations publication, Sales No. E.86.XIV.3), para. 379.

6. There are multiple ways of looking at self-determination. One understanding of the right focuses on the legitimacy of choice, so that every people may choose the form of government that it deems appropriate to its culture and traditions. Another perspective focuses on the right of two or more peoples to unify into one single State. An additional aspect emphasizes the possibility of exercising various degrees of cultural, economic and political autonomy within a State entity, and yet another expression of self-determination entails the aspiration to independent statehood. All these manifestations of self-determination should be interpreted in the context of the Charter and human rights treaties, which reject all forms of colonialism, neocolonialism and foreign occupation. As the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations annexed to General Assembly resolution 2625 (XXV) clarifies: "The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people." In all the cases described, self-determination can be understood as a vector of peace and part of a democratic and equitable world order.

7. In this connection, the Independent Expert recalls that the post-Second World War international order has been frequently challenged and changed in response to the aspirations of non-self-governing peoples to achieve internal and external self-determination. In some States, federalism has guaranteed the self-determination right of parts of the population. In others, separation has been the result of armed conflict. It would have been preferable to see the implementation of the right of self-determination occur by virtue of the recognition of entitlement and good-faith negotiation instead of through the use of force. Considering that in the twenty-first century many peoples have not achieved self-determination, it is important for the international community to recognize their aspirations and devise a strategy to facilitate their realization without armed conflict.

8. For human rights, peace, security and stability to flourish, the relationships between peoples and governmental entities must be based on genuine and continuing consent, on the understanding of a *contrat social* and, if this *contrat* is violated by Government, the people as sovereign have the democratic right to redefine the relationship. As Michael van Walt has noted: "Peace cannot exist in states that lack legitimacy or whose governments threaten the lives or well-being of a section of the population. The international community, its members and institutions have an obligation to act where international law, including human rights and especially the right of self-determination, is violated."[7]

9. The present report builds on the Independent Expert's previous reports, which rest on the premise that the Charter of the United Nations is the world's constitution and that the best possibility for human advancement lies in the rule of law. A democratic and equitable international order requires that all States observe the Charter and apply international law uniformly. World peace and security are best served when States observe treaties in good faith (*pacta sunt servanda*) and do not hedge or invent loopholes in implementing treaties that defeat the object and purpose thereof. The credibility of law depends on its uniform application. Norms

[7] See footnote 50.

cannot be applied à la carte. Unilateralism and exceptionalism must be seen as anachronisms in the twenty-first century.[8]

10. In the report, the Independent Expert surveys applicable norms and practices and concludes that international peace and security are at risk as long as peoples have not achieved self-determination, and as long as they suffer occupation and exploitation by foreign Powers. Thus, to achieve a democratic and equitable international order, it is necessary to ensure the enjoyment of self-determination by all peoples, which necessarily includes the right to live in one's homeland without being threatened by ethnic cleansing or expulsion from one's roots, history, land and resources.

11. Although the present interim report focuses primarily on external self-determination, which is where most conflict potential exists, the Independent Expert stresses the advantages of the internal dimension of self-determination.

12. By internal self-determination, we understand participatory democracy, as laid down in article 25 of the International Covenant on Civil and Political Rights, and the right of a population group within the State to participate in decision-making at the State level, which may also entail the right to exercise cultural, linguistic, religious and political autonomy within the boundaries of an existing State. By external self-determination or full self-determination, we understand the right to decide on the political status of a people in the international order in relation to other States, including the right to secede from an existing State.[9]

13. When human rights are enjoyed by all peoples without discrimination and populations have the feeling that they are in control of their destinies, they will be less disposed to seek external self-determination. Arrogance, exclusion, arbitrariness and neglect by Governments can drive peaceful peoples to despair and violence. Instead, Governments owe it to all persons under their jurisdiction to protect their human rights and to deploy confidence-building measures so as to create peaceful societies under the rule of law.

14. The Independent Expert recalls the words of Federico Mayor, former Director-General of the United Nations Educational, Scientific and Cultural Organization (UNESCO), at a UNESCO conference on the right to self-determination:

> In today's global world, the official borders between States have been relativized ... Everything possible must be done to ensure that the immediate political interests of States do not compromise the aspirations of all peoples for freedom and other legitimate rights. There must be negotiation among all the parties involved so that conflict is prevented and peaceful solutions found ... The right to self-determination must include cultural, linguistic and communication rights alongside of social, economic and political rights. One depends on the other.[10]

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[8] See, for example, Commission on Human Rights resolution 2004/64, para. 8.

[9] See also Committee on the Elimination of Racial Discrimination, general recommendation No. 21.

[10] See footnote 5.

II. Norms and practice

15. There is consensus among States, judges of international tribunals and professors of international law that self-determination is not only a principle but also a right that has achieved the status of *jus cogens*. Unfortunately, there is no authoritative definition of the right. As a political rather than a legal concept, self-determination can be traced back many centuries. It suffices to recall the Declaration of Independence of the United States of 4 July 1776, which proclaimed that Governments derive their powers from the consent of the governed and that, "whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or abolish it". Similarly, the French revolution advanced the doctrine of popular sovereignty and considered that any annexation of territory should be by plebiscite.

16. When the President of the United States, Woodrow Wilson, championed the principle of self-determination during the First World War, it sounded utopian in an era of rampant imperialism, colonialism and unabashed exploitation of weaker peoples. The idea was applied very imperfectly at the Paris Peace Conference of 1919, which redrew European frontiers in a manner disadvantageous to the human rights of the defeated nations. Later, the Atlantic Charter of 14 August 1941 established in eight "common principles" a vision for a post-Second World War world order. The second principle enunciated the principle of self-determination as a commitment "to see no territorial changes that do not accord with the freely expressed wishes of the peoples concerned". The third principle affirmed "the right of all peoples to choose the form of government under which they will live".

17. The great step forward was the adoption of the Charter of the United Nations and its emphasis on the principle of self-determination as a cornerstone of peace. Implementing the right of self-determination, however, has posed enormous problems because it requires balancing with other competing interests, notably the principle of territorial integrity. It is with good reason that the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States refers to the norm that "the territorial integrity and political independence of the State are inviolable". This does not mean, however, that flexibility is not possible or that frontiers cannot be subject to adjustment by peaceful negotiation with a view to better serving the purposes and principles of the United Nations. Additional problems arise as a result of geopolitical considerations that frequently affect the consistency and logic of States that enthusiastically recognize the exercise of self-determination by some peoples and just as passionately oppose it in other cases.

18. A review of norms and practice appears appropriate, beginning with the commitments undertaken by all States Members of the United Nations pursuant to Article 1 (2) of the Charter, which lists among the purposes of the Organization to "develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace". Pursuant to Article 14, the General Assembly may "recommend measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations". Pursuant to Article 24, the Security Council "shall act in accordance with the purposes and principles of the United Nations" in discharging its duties. Article 55 stipulates: "With a view to the creation of conditions of

stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote...." Chapter XI is entitled "Declaration regarding Non-Self-Governing Territories",[11] which imposes on the administrating Powers the "sacred trust" to advance the interests of the inhabitants, while Chapter XII established the international trusteeship system, the basic objectives of which were the promotion of "the political, economic, social and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence" (Article 76).

19. In countless resolutions the General Assembly has affirmed the right of self-determination, notably resolution 2625 (XXV), by which the Assembly adopted the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, whose preamble states "that the principle of equal rights and self-determination of peoples constitutes a significant contribution to contemporary international law, and that its effective application is of paramount importance for the promotion of friendly relations among States." The Declaration recognizes that the foreign subjection, domination and exploitation of peoples violate their human rights and pose a threat to international peace and security. Among its principles the Declaration stipulates: "Every State has the duty to refrain from any forcible action which deprives peoples ... of their right to self-determination and freedom and independence. In their actions against, and resistance to, such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter." Here, it is useful to recall that the international community can devise and employ innovative methods to support the bearers of the right of self-determination, to ensure the protection of their human rights while seeking to prevent or curtail violence and unrest.

20. The Vienna Declaration and Programme of Action, adopted in 1993, recognizes the right of self-determination in its preamble and stresses, in Part I, paragraph 2, that "all peoples have the right of self-determination.... Taking into account the particular situation of peoples under colonial or other forms of alien domination or foreign occupation, the World Conference on Human Rights recognizes the right of peoples to take any legitimate action, in accordance with the Charter of the United Nations, to realize their inalienable right of self-determination." The World Conference participants further fleshed out the links between the pursuance of self-determination and its interrelatedness with human rights by highlighting that the denial of self-determination is a violation of human rights.

21. While the above text recognizes self-determination as an inalienable right, it also points at the necessity of regulating its implementation in the light of other principles of international law, notably the maintenance of local, regional and

[11] See, in this regard, Makane Moïse Mbengue, "Non-Self-Governing Territories", in Max Planck Encyclopedia of Public International Law (http://opil.ouplaw.com/home/EPIL). See also General Assembly resolutions 9 (I), 66 (I), 146 (II), 1332 (XIII), 1466 (XIV), 1514 (XV) and 1803 (XVII). See further United Nations, "What the UN Can do to Assist Non-Self-Governing Territories", 2007, available from www.un.org/en/events/nonselfgoverning/pdf/What%20the%20UN%20can%20do.pdf.

international peace and security, as well as with principles of international human rights law, especially the right to be free from discrimination. The last part of paragraph 2 adds a caveat: "This shall not be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind." In other words, although territorial integrity is a reasonable principle of international stability, it is not an immutable norm of international relations and must be balanced against other principles, including human rights and self-determination, which are also conditions for international stability.

22. While General Assembly resolutions and the Vienna Declaration and Programme of Action constitute what may be termed "soft law", they have the virtue of reflecting a very large consensus on these central principles of the Organization. The "hard law" provisions on self-determination are best articulated in common article 1 of the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, which stipulates:

> 1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
>
> 2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
>
> 3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

23. In its general comment No. 12, the Human Rights Committee stated: "The right of self-determination is of particular importance because its realization is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights. It is for that reason that States set forth the right of self-determination in a provision of positive law in both Covenants and placed this provision as article 1 apart from and before all of the other rights in the two Covenants (para. 1)". The general comment underscores a particular aspect of the economic content of the right of self-determination, namely the right of peoples, for their own ends, freely to dispose of their natural wealth and resources. The general comment continues: "This right entails corresponding duties for all States and the international community. States should indicate any factors or difficulties which prevent the free disposal of their natural wealth and resources contrary to the provisions of this paragraph and to what extent that affects the enjoyment of other rights set forth in the Covenant (para. 5)".

24. Article 2 of the two International Covenants imposes legal obligations on States parties to implement all human rights, including the right of self-

determination, and to provide redress for violations. The Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human rights Law and Serious Violations of International Humanitarian Law (General Assembly resolution 60/147, annex) further underline the obligation of States to respect, ensure respect for and implement international human rights law and international humanitarian law; to take appropriate measures to prevent violations from happening; to investigate violations; and to ensure victims equal and effective access to justice as well as effective remedies.

25. Accordingly, the right of self-determination must be implemented through specific measures, including legislation and adjudication. The bearers of the right of self-determination possess justiciable rights, not mere promises.

26. Lastly, the International Court of Justice has pronounced itself on the principle and application of self-determination, among others in its advisory opinions on Namibia (South West Africa), Western Sahara and the legal consequences of the construction of a wall in the Occupied Palestinian Territory, including commenting on the *erga omnes* character of self-determination.

A. Progressive development of international law

27. The world order before the Charter of the United Nations was neither democratic nor equitable. International law reflected the interests of the great Powers and was codified to strengthen colonial and imperial sustainability. Since 1945 international law has not ceased to evolve. Respect for human rights has become a paramount consideration of legality, and self-determination is now recognized as a principle of legitimacy underlying modern international law.

28. External self-determination can entail unification or secession, the latter being the most contentious aspect. Historically, the separation of one part of a country from another has not been accomplished simply by virtue of pre-existing law, but frequently by force. Whereas the friendly separation of Czechoslovakia into two independent States in 1993 took place without force, the implosion of Yugoslavia in the 1990s was accompanied by war and ethnic cleansing and entailed the destruction of the country's territorial integrity and its separation into new entities and six new States Members of the United Nations. Similarly, the dissolution of the Soviet Union resulted in 15 new States. These are not only historical events, but legal precedents that have expanded the meaning of self-determination beyond the context of decolonization and placed it in the context of the human right to freedom by the expressed will of the peoples concerned.

29. More recent history has shown that the former entities and new States are also subject to internal tensions reflecting ethnic and religious differences, and sometimes the feeling of parts of the population that they cannot fully exercise their human rights in the context of the new State entity. Ensuring all human rights for all parts of the population so that they may feel empowered and represented in the new State entity is in the interest of all parties concerned. Otherwise, existing grievances may develop into a desire for full independence. If the principle of self-determination is recognized with regard to the secession of pa ts of old State entities, it can equally be applied to parts of new State entities.

30. A violation of the right of self-determination gives rise to a legitimate human rights claim by individuals and groups and triggers State responsibility to make reparation. Any such violation of *jus cogens* also has third-party effects and imposes *erga omnes* obligations on other States, however. The Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States reaffirms that "every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle".

31. In his final report, the Special Rapporteur of the Subcommission on Prevention of Discrimination and Protection of Minorities on human rights and population transfer, Awn Shawkat Al-Khasawneh, addressed the *erga omnes* issue in article 10 of his proposed draft declaration on population transfer and the implantation of settlers (E/CN.4/Sub.2/1997/23 and Corr.1, annex II):

> Where acts or omissions prohibited in the present Declaration are committed, the international community as a whole and individual States, are under an obligation: (a) not to recognize as legal the situation created by such acts; (b) in ongoing situations, to ensure the immediate cessation of the act and the reversal of the harmful consequences; (c) not to render aid, assistance or support, financial or otherwise, to the State which has committed or is committing such act ...

B. Self-determination and democracy

32. Self-determination is an expression of the individual and collective right to democracy, as democracy is an expression of the individual and collective right of self-determination. Both have national and international dimensions. The hallmark of self-determination must be public participation in decision-making and control over resources. In most cases this can be achieved within existing State entities, inter alia through federalism and other models of autonomy.

33. In the case of Non-Self-Governing Territories, self-determination referendums must be carefully organized so as to guarantee their democratic legitimacy and limit participation to those who really have a link to the Territory and not allow recent settlers and colonizers to participate therein on the same basis as natives;[12] nor can artificial barriers such as language tests be required, given that they sometimes exclude precisely those who are entitled to exercise self-determination. Articles 14, 18, 19, 21, 22 and 25 of the International Covenant on Civil and Political Rights should also inform every process of self-determination. The Vienna Declaration and Programme of Action added: "Democracy is based on the freely expressed will of the people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives" (part I, para. 8). Support is also provided by the Forum on Minority Issues, the second session of which was devoted to minorities and effective political participation. It recommended:

[12] Human Rights Committee, *Marie-Hélène Guillot et al. v. France*, communication No. 932/2000, views adopted on 15 July 2002. Cited in J. Möller and A. de Zayas, *United Nations Human Rights Committee Case Law* (Kehl/Strasbourg, N.P. Engel, 2009).

"Governments should take effective measures to end discrimination. They should consider, for instance, instituting independent monitoring and complaints mechanisms designed to prevent discrimination in voting, vote fraud, intimidation and similar acts that inhibit the effective participation of all, especially members of minorities, in electoral activities" (A/HRC/13/25, para. 10).

C. Unification in international law

34. The unification of States is a sovereign act and an expression of self-determination, consistent with the sovereign equality of States stipulated in the Charter. It cannot be frustrated by the geopolitical interests of third States. Thus, peoples who have been separated by the drawing of colonial or other arbitrary frontiers have a right to demand adjustment and reunification. Similarly, artificially separated States have a right to reunification, for example, when the two German States resulting from the surrender of Nazi Germany and the division of its territory into zones of occupation achieved reunification in 1990. Happily, this reunification occurred without the use of force and with the enthusiastic approval of the international community. In the twenty-first century there are other peoples who aspire to reunification. It is in the interest of peace and stability for the United Nations to address these concerns in a timely fashion and assist in coordinating negotiations in accordance with recognized international human rights standards.

III. Right to one's homeland

35. The right to one's homeland is the positive expression of the international prohibition of forced population transfers, recently referred to as ethnic cleansing. It is prior to and inseparable from self-determination. Several conventions specifically prohibit mass expulsions. Judgments and advisory opinions of the International Court of Justice and judgements of international human rights tribunals, including the European Court of Human Rights and the Inter-American Court of Human Rights, have held that forced transfers constitute massive violations of human rights and in particular of the right of self-determination.[13]

36. It would be too easy to frustrate the right of self-determination if it were legal to collectively uproot a population and bring in settlers so as to change the demographics of the territory concerned. In time of armed conflict this is specifically prohibited by article 49 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949 (Fourth Geneva Convention) ("Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country ... are prohibited."). Article 17 (1) of Additional Protocol II of 1977 to the Geneva Conventions applies this prohibition to internal displacements ("The displacement of the civilian population shall not be ordered...."). The expulsion of civilian populations constitutes a "grave breach"

[13] See Council of Europe, Parliamentary Assembly, "Enforced population transfer as a human rights violation", report of the Committee on Legal Affairs and Human Rights, document 12819, 9 January 2012. Available from http://assembly.coe.int/ASP/Doc/XrefViewPDF.asp?FileID=13204&Language=EN; A. de Zayas, "Forced population transfers", Max Planck Encyclopedia of Public International Law.

under article 147 of the Fourth Geneva Convention and under article 85 of Additional Protocol I of 1977. Mass expulsions are prohibited in the Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights).

37. In the Rome Statute of the International Criminal Court, the States parties agreed that "deportation or forcible transfer of population" constitutes a crime against humanity under article 7 (d), and that "unlawful deportation or transfer" constitutes war crimes under article 8 (2) (a) (vii). Article 16 of International Labour Organization (ILO) Indigenous and Tribal Peoples Convention, 1989 (No. 169) affirms the prohibition of involuntary transfers with regard to indigenous peoples.

38. Self-determination is inextricably related to the right to live in one's homeland and not be subjected to forced assimilation or mass expulsion. This right was already recognized in academic circles and consecrated in a series of lectures by the French international law expert Robert Redslob, who emphasized that "the forcible transfer of a population cannot be allowed because it violates a fundamental right ... and entails abandoning ... a highest possession, which humankind demands on the basis of a sacred right which all men strive for: the Homeland.... There is a right to the homeland, and it is a human right".[14]

39. Awn Shawkat Al-Khasawneh affirmed the right to the homeland in his final report to the Subcommission, referred to above. Article 4 (2) of the draft declaration states: "No person shall be compelled to leave his place of residence." The then United Nations High Commissioner for Human Rights, José Ayala Lasso, expressed it thus in his introductory remarks to a United Nations expert meeting on population transfers[15] held in Geneva in March 1997: "Mass expulsions violate the gamut of civil, political, economic, social and cultural rights."[16]

40. On 28 May 1995, Mr. Ayala Lasso delivered a statement in Frankfurt, Germany, asserting that "the right not to be expelled from one's homeland is a fundamental human right", thus rejecting collective expulsions and "collective punishment on the basis of general discrimination".

41. An essential component of the right of self-determination and of the right to the homeland is the right to return in safety and dignity to one's home and possessions. This right has been affirmed in many resolutions of the Security Council and General Assembly concerning, among others, Afghanistan, Bosnia and Herzegovina, Croatia, Cyprus, Kosovo,[17] Palestine and Timor-Leste. Article 16 (3)

[14] Robert Redslob, *Collected Courses of The Hague Academy of International Law*, vol. 37 (1931), p. 45; A. de Zayas, *Heimatrecht ist Menschenrecht* (Munich, Universitas, 2001), p. 39.

[15] The expert group affirmed the right to live and remain in one's homeland, i.e. the right not to be subjected to forcible displacement, as a fundamental human right and a prerequisite to the enjoyment of other rights. Reference was made to the extensive discussion of this issue at the session of the Institute for International Law held at Siena, Italy, which had concluded that transfers of population entailed serious violations of human rights. See also A. de Zayas, "The right to one's homeland, ethnic cleansing and the International Criminal Tribunal for the Former Yugoslavia", *Criminal Law Forum*, vol. 6, No. 2 (1995), pp. 257-314.

[16] See A. de Zayas, "Ethnic cleansing: applicable norms, emerging jurisprudence, implementable remedies", in J. Carey, W. Dunlap and R. J. Pritchard, eds., *International Humanitarian Law* (Martinus Nijhoff, 2003).

[17] References to Kosovo shall be understood to be in the context of Security Council resolution 1244 (1999).

of ILO Convention No. 169 affirms the right to return of indigenous peoples who have been displaced.

42. As the Human Rights Committee has stated in its general comment No. 17, "the right to return is of the utmost importance for refugees seeking voluntary repatriation. It also implies prohibition of enforced population transfers or mass expulsions to other countries" (para. 19).

43. The draft declaration on population transfer stipulates in its article 8:

> Every person has the right to return voluntarily, and in safety and dignity, to the country of origin and, within it, to the place of origin or choice. The exercise of the right to return does not preclude the victim's right to adequate remedies, including restoration of properties of which they were deprived in connection with or as a result of population transfers, compensation for any property that cannot be restored to them, and any other reparations provided for in international law.

44. The right to one's homeland is especially relevant to populations living under occupation, indigenous and non-self-governing peoples. Obstacles to the achievement of the implementation of the right to one's homeland, as an expression of the right of self-determination, are the conflicting geopolitical agendas of major powers and the economic interests of transnational corporations over the natural resources of weaker peoples. Frequently, advocates of self-determination are discredited as radicals or irredentists. It is clear that governmental paranoia about irredentism cannot trump a legitimate entitlement of self-determination. Labels aimed at incitement against minorities or indigenous peoples may entail violations of article 20 (2) of the International Covenant on Civil and Political Rights, which specifically prohibits incitement to discrimination, hostility or violence.

IV. Decolonization

45. In the light of the Charter of the United Nations, it became clear that colonialism had to be dismantled, but it was not until the 1960s that the General Assembly adopted groundbreaking resolutions on the subject.

46. The preamble to resolution 1514 (XV) on the Declaration on the Granting of Independence to Colonial Countries and Peoples of 1960 establishes the symbiotic link between self-determination and friendly relations among nations.

47. However, decolonization alone would not have given the formerly colonized peoples a decent future and equal opportunity to participate in global decision-making. It was necessary to adopt resolution 1803 (XVII) on permanent sovereignty over natural resources in 1962, paragraph 1 of which declares: "The right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned."

48. Paragraph 7 stipulates: "Violation of the rights of peoples and nations to sovereignty over their natural wealth and resources is contrary to the spirit and principles of the Charter of the United Nations and hinders the development of international cooperation and the maintenance of peace."

49. The decolonization process had already begun on the Indian subcontinent in 1947, followed by the independence of Indonesia in 1949, continuing in Asia, the Pacific Islands, Africa and Latin America. Decolonization was frequently preceded and accomplished by violence, as was the case in numerous African and Asian territories including Algeria, Namibia, Timor-Leste and Zimbabwe.

50. Decolonization was not only just and consistent with the Charter; it was necessary to end violence. Initially, decolonization was conducted on the basis of the *uti possidetis* doctrine, which had characterized the liberation of Latin American republics from Spanish and Portuguese rule, providing for the maintenance of the old colonial frontiers. In the African context, however, *uti possidetis* ushered in many potential conflicts.

51. From 1960 to 1962, the decolonized Belgian Congo experienced a war in which two of its ethnically different and mineral-rich provinces unsuccessfully attempted secession. From 1967 to 1970, the Igbos of Nigeria unsuccessfully attempted to separate and the Biafran war left 1 million casualties in its wake. In 1971, East Pakistan separated and emerged as the new State of Bangladesh. In 1975, Timor-Leste became independent from Portugal, was invaded and occupied by Indonesia and emerged as a new independent State in 2002. In 1991, after a 30-year war, Eritrea gained its independence from Ethiopia, following a referendum supervised by the United Nations. In 2011, after a 20-year war, South Sudan separated from the Sudan pursuant to a referendum also organized by the United Nations. Thus, it is clear that decolonization did not pronounce the last word on self-determination. To avert future armed conflict, timely adjustment of frontiers is a peace-promoting policy that should be applied with international solidarity. There is no reason to insist on the "sanctity" of national borders, which sometimes owe their existence to very unsaintly means.

52. Secession has also occurred outside the decolonization context in response to a people-centred perception that full independence is the only means to restore fundamental rights and freedoms. This aspect of self-determination draws its legitimacy from the fundamental right of rebelling against tyranny, a right of last resort specifically referred to in the preamble to the Universal Declaration of Human Rights.[18]

V. Non-self-governing and indigenous peoples

53. When the Charter was adopted, many peoples lived under foreign rule. Colonialism was widespread, peoples were subjected to military occupation and minorities and indigenous peoples had little or no international protection.

54. The process of self-determination did not end with decolonization and the independence of trust territories. Even today there are many unrepresented peoples and nations, peoples living under occupation and a majority of indigenous peoples in several continents who aspire to exercise self-determination, whether in the form of autonomy within existing States or independence. It is therefore necessary to devote attention to their situation, consult with the peoples concerned and ensure

[18] "[I]t is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law."

their right to participate in decision-making, in particular on all matters that directly concern them, their lands, their natural resources and their culture.

55. There is a list of 17 remaining Non-Self-Governing Territories for which the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples carries out a degree of supervision.[19] This list is obviously incomplete, however, given that there are other non-self-governing peoples who aspire to have a voice before the Committee. The question thus arises whether other territories should be added to the list on the ground that the populations claim that they do not enjoy self-determination. Moreover, there are questions concerning the earlier delisting of some Territories for which the administrating Powers have ceased to report, but whose delisting has been described by observers as "irregular".

56. Even today, indigenous peoples and colonized and occupied peoples are not vested with their proper status at the national or international level. The United Nations could grant them such status as a corollary to the right of self-determination in a manner that allows for their equal participation and their free, prior and informed consent on all matters that affect them and at all levels within the United Nations system. Part of the problem with the delayed discussion on the self-determination of indigenous peoples was the fact that Governments essentially marginalized them. Moreover, the devastating impact of the policies applied by the colonizers, including massacres, spoliation, re-education and cultural dislocation paralysed many indigenous peoples. Michael van Walt observed that "a number of first nations of the Americas ... no longer exist as a result of genocide".[20] A partial recognition of the injustices is reflected in several apologies issued by Governments over the past two decades.[21] Such apologies are appropriate, but a proactive policy to reduce continuing effects and to heal the profound trauma inflicted on indigenous peoples is necessary.

57. As history has witnessed, indigenous peoples have been unable to achieve autonomy or self-government and obtain redress in the same ways as other rights bearers. This is attributable in part to the devastation of their numbers and the assault on their culture, which rendered them too weak to assert their rights and frequently left them in extreme poverty, unable even to obtain adequate legal representation.[22] Greater access to the international forum and the permeation of

[19] In Africa: Western Sahara. In the Atlantic and Caribbean: Anguilla, Bermuda, British Virgin Islands, Cayman Islands, Falkland Islands (Malvinas), Montserrat, St. Helena, Turks and Caicos Islands, United States Virgin Islands. In Europe : Gibraltar. In Asia and the Pacific: American Samoa, French Polynesia, Guam, New Caledonia, Pitcairn and Tokelau.

[20] See footnote 5.

[21] Apology by the United States Government to the Hawaiian people, 1993; apology by the Government of Australia to Australia's indigenous peoples, 2008; apology by the United States Government to native peoples of the United States, 2010; apology by the Government of Canada for injustices to the native peoples, 1998; apology by the Government of Canada to former students of Indian Residential Schools, 2008; apology by the Government of Sweden to the Sami people, 1998; apology by King Harald V of Norway to the Sami people, 1997.

[22] Bartolomé de las Casas, *Brevísima relación de la destrucción de las Indias (A Brief Account of the Devastation of the Indies)*, 1542; Richard Drinnon, *Facing West* (University of Oklahoma Press, 1997); Frederick Hoxie, ed., *Encyclopedia of North American Indians* (Houghton Mifflin Harcourt, 1996), in particular the entry "Population: precontact to present"; David Stannard, *American Holocaust* (Oxford University Press, 1992; Eduardo Galeano, *Open Veins of Latin America* (Monthly Review Press, 1997).

human rights principles has allowed indigenous peoples to emerge from this past powerlessness.[23]

58. It is time to face "historical inequities"[24] and abandon the culture of silence. There are many open accounts worldwide that should be settled — peacefully — through good-faith negotiation with indigenous peoples, whose inalienable rights have not been extinguished through lapse of time or through the racist and factually inapplicable doctrine of discovery (see E/C.19/2014/3). A breakthrough was achieved in 1992 in Australia when the High Court, in *Mabo and others v. Queensland*, overturned the *terra nullius* doctrine.[25] Similarly, the Supreme Court of Canada in a number of recent judgements has ruled in favour of the claims of First Nations to the return of their lands.[26] As the Permanent Forum study observes: "The Doctrine of Discovery is significant globally not only for abuses in the past, but also for its ongoing far-reaching consequences. Such colonial doctrines must not prevail in practice over human rights, democracy and the rule of law" (ibid., para. 32).

59. The adoption of ILO Convention No. 169 was of enormous importance, especially considering that indigenous populations are still subject to dispossessions and involuntary transfers.

60. The United Nations Declaration on the Rights of Indigenous Peoples constitutes a milestone in the struggle of indigenous peoples for self-determination and provides an important catalogue of rights and entitlements that should guide both Governments and the indigenous peoples themselves. Beginning in its preamble, the Declaration expresses concern "that indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests". Article 3 stipulates: "Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." Article 8 (1) affirms that indigenous peoples and individuals have the "right not to be subjected to forced assimilation or destruction or their culture". Article 19 states: "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them." Article 28 (1) stipulates that indigenous peoples have the right to get back or be compensated when the lands, territories or resources have been wrongly taken away, occupied, used or damaged without their free, prior and informed consent. Article 32 further stipulates that indigenous peoples have the right to decide how they wish to develop their lands and resources. Governments must respect and protect these rights. Indigenous peoples' free, prior and informed consent must be obtained when any decisions are made that may affect the rights to

[23] See www.idlenomore.ca/.

[24] *Chief Bernard Ominayak and the Lubicon Lake Band v. Canada*, communication No. 167/1984, views of the Human Rights Committee adopted on 26 March 1990, p. 33: "Historical inequities to which the State party refers, and certain more recent developments threaten the way of life and culture of the Lubicon Lake Band, and constitute a violation of article 27 [of the International Covenant on Civil and Political Rights] so long as they continue." Cited in Möller and de Zayas, p. 447.

[25] www.aiatsis.gov.au/_files/ntru/resources/resourceissues/mabo.pdf.

[26] See http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/14246/index.do.

their lands, resources or waters (see A/HRC/18/35). Justice and equity require that many of these articles be given some retroactive effect, so as to counter the continuing effects of earlier injustices and grant a measure of rehabilitation.

61. Unfortunately, some States reject the Declaration, considering it to be non-binding. In this regard, the Special Rapporteur on the rights of indigenous peoples, James Anaya, has observed:

> Debilitating to the Declaration are repeated assertions that the Declaration is non-binding, characterizations of the Declaration as granting privileges to indigenous peoples over others, and the position advanced by some States that the right to self-determination affirmed in the Declaration is different from self-determination in international law. These assertions and positions are each flawed ... they only serve to weaken the force of the broad consensus underlying the Declaration and of its role as an instrument of human rights and restorative justice (A/68/317, para. 88).

62. With regard to sovereignty over natural resources, the Special Rapporteur has suggested that a new model more conducive to indigenous peoples' self-determination and their right to pursue their own priorities of development is needed, noting that direct negotiations between companies and indigenous peoples may be the most efficient and desirable way of arriving at agreed-upon arrangements for the extraction of natural resources (A/HRC/21/47, para. 70).

VI. Criteria for the exercise of self-determination

63. Any process aimed at self-determination should be accompanied by participation and consent of the peoples concerned. It is possible to reach solutions that guarantee self-determination within an existing State entity, e.g. autonomy, federalism and self-government.[27] If there is a compelling demand for separation, however, it is most important to avoid the use of force, which would endanger local, regional and international stability and further erode the enjoyment of other human rights. Therefore, good-faith negotiations and the readiness to compromise are necessary; in some cases these could be coordinated through the good offices of the Secretary-General or under the auspices of the Security Council or the General Assembly.

64. To address the multiple and complex issues involved in achieving self-determination, a number of factors have to be evaluated on a case-by- case basis. In this context, it would be useful if the General Assembly were to request the International Court of Justice to issue advisory opinions on the following questions: What are the criteria that would determine the exercise of self-determination by way of greater autonomy or independence? What role should the United Nations play in facilitating the peaceful transition from one State entity to multiple State entities, or from multiple State entities to a single entity?

65. Some of the factors to be taken into consideration in the context of unification, autonomy or secession are described in the following paragraphs.

[27] See the rationale for the judgement of the Supreme Court of Canada concerning Québec, available from www.scc-csc.gc.ca/case-dossier/info/dock-regi-eng.aspx?cas=25506.

66. Self-determination has emerged as a *jus cogens* norm and is enshrined in Article 1 of the Charter as one of the purposes of the Organization. The right is not extinguished with lapse of time because, just as the rights to life, freedom and identity, it is too important to be waived. All manifestations of self-determination are on the table: from a full guarantee of cultural, linguistic and religious rights, to various models of autonomy, to special status in a federal State, to secession and full independence, to unification of two State entities, to cross-border and regional cooperation.

67. The implementation of self-determination is not exclusively within the domestic jurisdiction of the State concerned, but is a legitimate concern of the international community.

68. The rule of law entails more than positivism, which is seldom adequate to solve complex political situations that require flexibility and compromise. More important is the spirit of the law, those principles that underlie the codification of norms as an approximation of justice.

69. Neither the right of self-determination nor the principle of territorial integrity is absolute. Both must be applied in the context of the Charter and human rights treaties so as to serve the purposes and principles of the United Nations.

70. The principle of territorial integrity cannot be used as a pretext to undermine the State's responsibility to protect the human rights of the peoples under its jurisdiction. The full enjoyment of human rights by all persons within a State and peaceful coexistence among States are the principal goals to achieve. Guarantees of equality and non-discrimination are necessary for the internal stability of States, but non-discrimination alone may not be enough to keep peoples together when they do not want to live together. The principle of territorial integrity is not sufficient justification to perpetuate situations of internal conflict that may erupt in civil war and threaten regional and international peace and security.

71. International law evolves through practice and precedents. The independence of the former Soviet republics and the secession of the peoples of the former Yugoslavia created precedents for the implementation of self-determination that must be considered whenever self-determination disputes arise.

72. The aspiration of peoples to fully exercise the right of self-determination did not end with decolonization. There are many indigenous peoples, non-self-governing peoples and populations living under occupation who still strive for self-determination. Their aspirations must be taken seriously for the sake of conflict prevention. The post-colonial world left a legacy of frontiers that do not correspond to ethnic, cultural, religious or linguistic criteria. This is a continuing source of tension that may require adjustment in keeping with Article 2 (3) of the Charter. The doctrine of *uti possidetis* is obsolete and its maintenance in the twenty-first century without possibility of peaceful adjustments may perpetuate human rights violations.

73. The United Nations could be called upon to assist in the preparation of models of autonomy, federalism and, eventually, referendums. A reliable method of determining public opinion and avoiding manufactured consent must be devised so as to ensure the authenticity of the expression of public will in the absence of threats of or the use of force. Long-standing historical links to a territory or region, religious links to sacred sites, the consciousness of the heritage of prior generations as well as a subjective identification with a territory must be given due weight.

Agreements with persons who are not properly authorized to represent the populations concerned and *a fortiori* agreements with puppet representatives are invalid. In the absence of a process of good-faith negotiation or plebiscites, there is a danger of armed revolt.

74. A consistent pattern of gross and reliably attested violations of human rights against a population negates the legitimacy of the exercise of governmental power. In case of unrest, dialogue must first be engaged in the hope of redressing grievances. States may not first provoke the population by committing grave human rights abuses and then invoke the right of self-defence in justification of the use of force against them. That would violate the principle of estoppel (*ex injuria non oritur jus*), a general principle of law recognized by the International Court of Justice. Although all States have the right of self-defence from armed attack under Article 51 of the Charter, they also have the responsibility to protect the life and security of all persons under their jurisdiction. No doctrine, not that of territorial integrity nor that of self-determination, justifies massacres; neither doctrine can derogate from the right to life. Norms are not mathematics and must be applied with flexibility and a sense for proportionality in order to reduce and prevent chaos and death.

75. Secession presupposes the capacity of a territory to emerge as a functioning member of the international community. In this context, the four statehood criteria of the Montevideo Convention on the Rights and Duties of States (1933) are relevant: a permanent population; a defined territory; government; and the capacity to enter into relations with other States.[28] The size of the population concerned and the economic viability of the territory are also relevant. A democratic form of government that respects human rights and the rule of law strengthens the entitlement. The recognition of a new State entity by other States is desirable but it has declaratory, not constitutive, effect.

76. When a multi-ethnic and/or multi-religious State entity is broken up, and the resulting new State entities are also multi-ethnic or multi-religious and continue to suffer from old animosities and violence, the same principle of secession can be applied. If a piece of the whole can be separated from the whole, then a piece of the piece can also be separated under the same rules of law and logic. The main goal is to arrive at a world order in which States observe human rights and the rule of law internally and live in peaceful relations with other States.

77. Sustainable internal and external peace requires the implementation of self-determination of peoples, which is an expression of democracy: government by consent of the governed. As Willy Brand said in his Nobel Peace Prize lecture, waging war to prevent self-determination is the *ultima irratio*.

VII. Outlook and recommendations

78. **Self-determination is a work in progress, a process of adapting and readapting to tensions between power and freedom. Rather than perceiving self-determination as a source of conflict, a better approach is to see armed conflict as a consequence of the violation of self-determination. There are many**

[28] See www.jus.uio.no/english/services/library/treaties/01/1-02/rights-duties-states.xml.

countries in which issues of enhanced democracy, autonomy and self-government require timely discussion.

79. A peaceful, democratic and equitable international order is best served by a symbiotic accommodation of the principle of territorial integrity, vindicated by States, and the right of self-determination held by peoples. Both are subject to adjustment and should not be treated as hyperboles of immutable law. While the extreme notion of sovereignty has a territorial fixation, sometimes the concept of self-determination is reduced to only one option: separation. There are multiple ways of exercising self-determination, the implementation of which constitutes an important strategy to promote national and international stability and prevent ethnic or religious tensions from developing into breaches of local, regional or international peace.

80. There is an emerging customary international law on self-determination that takes into account the emergence of new State entities following the dissolution of the Soviet Union and Yugoslavia and the friendly separation of Czechoslovakia. This customary international law is not self-executing, however.

81. International law being dynamic, it is no longer the same as it was at the beginning of the twentieth century, or at the end of the Second World War. There has been a progressive development towards the primacy of human rights over State rights. Many international lawyers, political scientists and sociologists recognize that, whereas States are pragmatic constructs that enable effective exercise of jurisdiction, and while many States have been shaped by imperial and colonial policies that disregard geographic, ethnic, religious, linguistic and historical realities, peoples constitute another kind of reality, an older and deeply felt force that binds generations and survives changes in boundaries and Governments. Whereas the principle of territorial integrity is a legal, political and pragmatic construct, the right of self-determination has a profound ethical basis.[29]

82. Meanwhile, the principle of territorial integrity no longer possesses a higher status in international law than the right of self-determination, which is anchored in the Charter of the United Nations and in the International Covenants on Human Rights. A balancing of rights and interests must be carried out, always with a view to achieving greater respect for human rights and widening the democratic space.

83. There remains insufficient consciousness in the international community of the enormity of the injustice that colonialism and settlement meant for the peoples of many continents. It is to be welcomed that gradually, politicians have found words to apologize. Apologies should, however, be followed by rehabilitation.

84. In recent decades, the international community has witnessed instances of the reunification of States and also the separation of States into independent State entities. Current and future conflicts concerning the implementation of self-determination should be solved by negotiation within the context of the Charter and the rule of law.

85. Bearing in mind that international law is universal, the criteria for exercising and recognizing the right of self-determination must be applied

[29] See footnote 5.

uniformly. Otherwise, the credibility and predictability of international law would be seriously compromised. The modern perspective on self-determination focuses on its function as a means to promote peace. In short: States have the sacred duty to ensure peace, while individuals and peoples have the right to peace.[30]

86. **On the basis of the foregoing, and with the view to advancing the implementation of General Assembly resolution 68/175, the Independent Expert recommends that States:**

(a) **Take measures to implement common article 1 of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, which stipulates the right of all peoples to self-determination;**

(b) **Treat all populations under their jurisdiction in accordance with internationally accepted human rights norms, enable their participation in decision-making, consult them, provide legal remedies for violations of their rights and ensure enforcement of judicial decisions;**

(c) **Proactively report to the Human Rights Council on the enjoyment of self-determination by populations under their jurisdiction, pursuant to the universal periodic review procedure. They should similarly report on self-determination matters to the Human Rights Committee and to the Committee on Economic, Social and Cultural Rights;**

(d) **Demonstrate that they are prepared to work towards a peaceful change of status through democratic political means, especially in situations of protracted conflict;**

(e) **Assist post-secession States in establishing the rule of law and ensuring human rights;**

(f) **Surpass the minimum required by human rights treaties and implement soft law in the spirit of the Charter. They should not shun good-faith pledges and commitments merely because they do not constitute "hard law";**

(g) **Enforce treaties made with indigenous populations (see E/CN.4/Sub.2/1999/20) and negotiate only with their legitimate representatives. Decisions affecting indigenous peoples must be taken with their free, prior and informed consent. States should adopt appropriate national legislation to implement the provisions of the United Nations Declaration on the Rights of Indigenous Peoples and ILO Convention No. 169;**

(h) **Recognize and support indigenous peoples' legal systems and parliaments, which should have a special status so as to authentically represent their communities nationally and internationally.**

87. **He also recommends that the General Assembly:**

(a) **Consider establishing a special mechanism to monitor the reality of self-determination today, in particular the situation of unrepresented peoples and non-self-governing peoples who are not currently being considered under**

[30] A. de Zayas, "Peace as a human right", in A. Eide, J. Möller and I. Ziemele, eds., *Making Peoples Heard* (Leiden, Martinus Nijhoff, 2011), pp. 27-43.

Article 73 of the Charter, or assign more targeted functions to the Fourth Committee of the General Assembly, so as to supervise the proper application of Chapter XI procedures;

(b) Consider tasking the Human Rights Council with the examination of self-determination issues as a permanent item in its agenda or as part of the universal periodic review procedure, especially from the functional perspective of self-determination as a tool to promote international peace and security;

(c) Consider referring to the International Court of Justice for advisory opinions on specific legal questions concerning the scope of application of self-determination, its *erga omnes* implications, and issues of restitution and reparation to victims;

(d) Consider employing the good offices of the Secretary-General to advance the implementation of self-determination;

(e) Consider activating the special status of indigenous peoples and granting them, along with colonized and occupied populations, standing to participate in the General Assembly and its subsidiary bodies;

(f) Demonstrating the same realism shown in General Assembly resolutions 1654 (XVI) and 1803 (XVII), proactively assist in the peaceful achievement of self-determination by non-self-governing peoples and peoples living under occupation in the twenty-first century, bearing in mind that the post-colonial world inherited ethnic, social and religious problems resulting from the arbitrary drawing of frontiers;

(g) Consider developing programmes of assistance and transitional justice to support peoples who have recently attained self-determination, in cooperation with United Nations agencies including the United Nations Children's Fund, the United Nations Development Programme, ILO, the World Health Organization, UNESCO, the United Nations Environment Programme and the World Intellectual Property Organization.

88. By way of conclusion, the Independent Expert expresses appreciation to the Office of the High Commissioner for Human Rights and its staff, a centre of excellence and positive impulses. He urges the General Assembly to grant enhanced resources to the Office so that it can strengthen its work for all members of the human family, including through the provision of advisory services and technical assistance and appropriate follow-up mechanisms.

89. The Independent Expert endorses the vision of Rigoberta Menchú, 1992 Nobel Peace Prize Laureate, who champions:

> The hope of those who have learned to resist, who have learned to build and dream of a brighter future — a future in which a sense of community and a respect for nature become parameters for coexistence, a future in which cultural and linguistic diversity is seen as the great wealth of humankind. It is our deepest desire that this new millennium be based in equality, in justice at both the national and international levels, in the free self-determination of all peoples, and in a harmonious relationship with nature. Only then will it be possible to nurture sustainable development as well as an equitable distribution of wealth. Thus will peace sustain itself.

United Nations A/69/273

General Assembly

Distr.: General
7 August 2014

Original: English

Sixty-ninth session
Item 69 (b) of the provisional agenda*
Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms

Effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights

Note by the Secretary-General

The Secretary-General has the honour to transmit to the members of the General Assembly the report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, Juan Pablo Bohoslavsky, submitted pursuant to Human Rights Council resolution 25/16.

* A/69/150.

14-58891 (E) 260814

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Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights

Summary

The present report sets out the preliminary workplan of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, for the period 2014-2017.

The Independent Expert would like to focus on six thematic areas: (a) preventive aspects of fiscal policy and debt management to avoid potential negative human rights implications of borrowing; (b) international human rights law in the context of debt restructuring and debt relief; (c) good practices to avoid negative human rights implications in the context of debt crisis and economic adjustment programmes; (d) human rights and debt arbitration in the context of bilateral investment treaties; (e) lending to States and non-State actors involved in gross human rights violations and transitional justice; (f) impact of illicit financial flows on human rights.

The Independent Expert would like to engage actively in international forums and enhance his engagement with States, including the Group of 20 and the Group of 77, international financial institutions, the Paris Club, United Nations entities and other international organizations, civil society organizations, the private sector and academia. He also intends to play an active role in the implementation of the post-2015 development agenda and related events. Country visits will be aimed at identifying good practices and assisting Governments in implementing internationally agreed (sustainable) development goals or in pursuing debt or adjustment policies informed by human rights law. The Independent Expert will also provide advice and, if needed, undertake advocacy and raise concerns through established working methods of special procedures. Throughout his work, he will continue to pay attention to the particular impact of policies at the international, national and local levels on women, children, persons with disabilities, indigenous people, migrants, minorities and other groups. The Independent Expert will craft his advice and policy recommendations on the basis of not only the obligations and guidance provided by international human rights law but also solid empirical evidence, which demonstrates that putting human rights at the heart of development and financial policies will frequently lead to better and more sustainable results.

I. Introduction

1. The present report sets out the preliminary workplan of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, for the period from 2014 to 2017. On 8 May 2014, Juan Pablo Bohoslavsky was appointed by the Human Rights Council as the new Independent Expert on the effects of foreign debt; he assumed office on 2 June 2014. His report is submitted pursuant to Council resolution 25/16, in which the Council requested him to report regularly to the Council and the General Assembly.

2. The report is structured as follows: first, it provides a short background on the history of the mandate followed by a brief overview of the informal consultations that the Independent Expert held in New York and Washington, D.C., from 7 to 11 July 2014. It then outlines six thematic priorities that the Independent Expert would like to study further during his first three years. They include: (a) preventive aspects of debt policy and debt management to avoid potential negative human rights implications of borrowing; (b) international human rights law in the context of debt restructuring and debt relief; (c) good practices to avoid negative human rights implications in the context of debt crisis and economic adjustment programmes; (d) human rights and debt arbitration in the context of bilateral investment treaties; (e) lending to States involved in gross human rights violations and transitional justice; and (f) impact of illicit financial flows on human rights.

3. The last section outlines the methodological approach that the new Independent Expert will follow while implementing his mandate. This includes participation in international debates on debt relief, debt restructuring, financing for development, and illicit financial flows. In this context, he intends to attend key events, in particular those related to the further development and implementation of the United Nations post-2015 development agenda. He would like to enhance dialogue and engagement with States, international financial institutions, United Nations agencies and other international organizations, the private sector, civil society and academia. Country visits will be essential to identifying good practices, assisting Governments in implementing internationally agreed (sustainable) development goals, learning from national and local experiences and identifying human rights challenges that States face while pursuing debt or adjustment policies. The Independent Expert will need to provide advice, undertake advocacy and raise concerns through established working methods of special procedures, including communications and public statements, and continue to pay attention to the particular impact of debt and structural adjustment policies at the international, national and local levels on women, children, persons with disabilities, indigenous people, migrants, minorities and other groups. He will base his advice and policy recommendations on the obligations and policy guidance that international human rights law provides. His intention is not only to remind States and other stakeholders about their human rights obligations or responsibilities but also to provide advice to them when they are required to take difficult decisions in challenging circumstances. His research and advice will therefore focus on good practice and solid empirical evidence.

II. Background of the mandate

4. The mandate of the Independent Expert was established in 2000, when two special procedures mandates of the Commission on Human Rights covering the effects of foreign debt and structural adjustment policies were merged. Since then, the mandate has been adjusted and the mandate holder requested to cover additional issues. Previous mandate holders include Fantu Cheru (Independent Expert on structural adjustment policies, 1998-2001), Reinaldo Figueredo (Special Rapporteur on the effects of foreign debt on the full enjoyment of economic, social and cultural rights, 1998-2000), Bernards Mudho (2001-2008) and Cephas Lumina (2008-2014).

5. After a comprehensive consultative process with States, academic experts and civil society representatives, the previous mandate holder, Cephas Lumina, presented the Guiding Principles on foreign debt and human rights (A/HRC/20/23, annex) to the Human Rights Council in June 2012. The Guiding Principles were endorsed by the Council on 5 July 2012 in resolution 20/10. The previous mandate holder contributed to the clarification of many important issues, including the topic of vulture funds and human rights (A/HRC/14/21), international trade, debt and human rights (see A/65/260 and Corr.1), export credit agencies and human rights (see A/66/271) and the impact of foreign debt and related policies on women's rights (see A/67/304). He also presented an interim and a final study on the impact of non-repatriation of illicit funds on the enjoyment of human rights (A/HRC/22/42 and A/HRC/25/52, respectively) to the Council. His most recent thematic reports include an assessment of the human rights impact of international debt relief initiatives (A/HRC/23/37) and a report which focused on the lessons learned from the implementation of Goal 8 of the Millennium Development Goals, global partnership for development (see A/68/542).

6. The mandate of the Independent Expert was extended on 27 March 2014 by the Human Rights Council in its resolution 25/16 for a period of three years. The Independent Expert reports every year to the Council (in March) and to the General Assembly (in October).

7. In addition, in its resolution 25/9, the Human Rights Council requested the Independent Expert to continue to consider the impact of illicit financial flows on the enjoyment of human rights as part of the mandate. The Council also requested the Independent Expert to undertake a further analysis of the negative impact of illicit financial flows in the context of the post-2015 development agenda and to present an interim report on the topic to the Council in March 2015 and a final study after one year.

III. Informal consultations on the workplan

8. The Independent Expert made available a draft version of the workplan on the website of the Office of the United Nations High Commissioner for Human Rights (OHCHR) and invited States, international financial institutions, international organizations, the private sector, civil society organizations and academic experts to provide comments. In this context, he would like to share his appreciation for the written submissions received from the Asia Pacific Forum on Women, Law and Development, the Center for Economic and Social Rights, the Center for Women's Global Leadership at Rutgers University, Global Financial Integrity, the

International Commission of Jurists, the European Network on Debt and Development (Eurodad, on behalf of 12 civil society organizations) and several academic experts from Africa, Asia, Europe, Latin America and the United States of America.

9. He held a series of informal consultations with State representatives, international financial institutions and civil society representatives in New York and Washington, D.C., from 8 to 11 July 2014. In addition, he participated in an expert group meeting held in New York on 7 July 2014 by the United Nations Conference on Trade and Development (UNCTAD). The meeting was held in the context of the UNCTAD initiative aimed at elaborating and proposing to the international community a concrete debt workout mechanism.

10. His interlocutors in New York and Washington, D.C., included representatives from several States and officials from the European Union, the International Monetary Fund, the World Bank and the Inter-American Development Bank. He also met the Coordinator of the Stolen Assets Recovery Initiative, a joint initiative of the World Bank and the United Nations Office on Drugs and Crime; the Executive Managing Director of the Institute of International Finance; the President of Global Financial Integrity; a member of the Advisory Board of the Business and Society Programme of the Aspen Institute; and representatives of the Center for Economic and Social Rights, the Center of Concern and Jubilee USA Network. The Independent Expert engaged in a very fruitful exchange with the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence on the former's work programme. He would like to extend his sincere thanks to all his interlocutors for taking the time to meet with him and provide valuable feedback on his draft workplan. While not all comments have been incorporated in the present report, many of them will be very useful as the Independent Expert explores the thematic issues outlined below in more detail.

IV. Thematic priorities for 2014 to 2017

11. While the six substantive themes are separated for the purposes of the present document, it is stressed that the mandate holder will highlight the linkages among them. As not all stakeholders may have found time to provide feedback during the few weeks since the Independent Expert assumed office, he is open to receiving further comments and suggestions. The workplan outlined below may therefore be further adjusted. In addition, some flexibility in implementing the workplan should remain, to ensure that the mandate holder can respond adequately to new developments that will require his attention. Finally, the full realization of the work programme may depend on whether the mandate holder receives support in addition to the core funding provided through the regular budget of the United Nations.

A. Preventive aspects of fiscal policies and debt management

12. Sovereign debt and human rights discourse may have preventive aspects in the context of debt crises which have remained largely unexplored by the academic, civil society, governmental and international communities. Debt policies and debt management strategies designed and implemented by Governments and monitored by international financial institutions rarely take into consideration the human rights

implications of debt portfolios. The idea is not to wait until a debt crisis erupts, with potential negative impacts on the realization of economic, social and cultural rights, but to increase awareness that such impacts can frequently be avoided by improved fiscal policies and debt management.[1] Contributing to the enhancement of this preventive dimension of human rights law in sovereign financing constitutes a goal in itself. While ensuring the enjoyment of human rights sometimes requires resources, international human rights standards should inform the facilitation of responsible, effective and sustainable fiscal policies and management strategies. This includes the study of contemporary and prominent sovereign financing instruments, such as bond and derivate trading.

B. Human rights in the context of debt restructuring and debt relief

13. International law applicable to sovereign debt restructuring is still in its infant stage. Some international rules and principles are emerging and are being consolidated. As sovereign insolvency has obvious implications for the enjoyment of economic, social and cultural rights by debtors' populations and of their right to development, international human rights law should be considered when defining and identifying the rules governing debt restructurings. Standstill agreements, seniority, the distribution of financial losses between debtors and creditors and among creditors, the legitimacy of decision-making processes, holdout creditors' rights, and the procedural and substantive aspects of vulture funds litigation are concrete examples of problems and challenges posed by every debt restructuring, the rules relating to which should also be informed by international human rights law. Research will be encouraged in this realm, and the Independent Expert will undertake, when suitable, advocacy for a human rights-based approach to debt restructuring and debt relief.

C. Good practices in dealing with debt crisis

14. The mandate holder will continue to monitor how debt burdens and adjustment programmes affect the enjoyment of human rights. Such monitoring will be complemented with the exploration of more sophisticated tools informed by human rights law to give Governments and those severely affected by such programmes more effective means to prevent negative human rights impacts that may result from such policies, and, if required, receive compensation for them. Such tools may operate at both the domestic and international levels. In the same vein, it is necessary to identify best practices for decision-making in situations in which retrogressive measures cannot be avoided owing to necessity. Who is affected by policy reforms, how much and for how long? How can adjustment policies be implemented in a manner that human rights, including those of vulnerable or marginalized groups (including, but not limited to, children and women), are respected and that essential levels of economic, social and cultural rights remain guaranteed? These are all delicate questions that Governments have been seeking to answer with varying degrees of success from the human rights viewpoint. Lessons can be learned from these experiences.

[1] See also in this context the recent report on fiscal and taxation policies and human rights of the Special Rapporteur on extreme poverty and human rights (A/HRC/26/28).

15. The identification of applicable rights and appropriate remedies in the debt context will ensure that the claims of adversely affected groups can be considered alongside those of creditors and other stakeholders in formulating any debt restructuring or adjustment programme.

D. Debt disputes and bilateral investment treaties

16. International investment arbitration is increasingly used to solve disputes between sovereign debtors and their creditors despite the legal gaps and inconsistencies in foreign investment law and institutional weaknesses in the international arbitration system. Nevertheless, given that its application to debt disputes is ultimately a policy choice of the parties to the treaties, and as cases are actually proceeding, it would be useful to explore whether international human rights law has, and should have, a role in this area when dealing with sovereign debt disputes while monitoring the evolution of those arbitration cases. [2] Creditors' property rights, States' responsibilities and the fundamental rights of debtors' populations need to be fairly balanced in every debt dispute forum while adequately dealing with the collective action problems that debt distress brings.

E. Lending to States and non-State actors engaged in gross human rights violations

17. While acknowledging the seminal work on sovereign debt and human rights carried out in 1978 by Antonio Cassese for the Sub-Commission on Prevention of Discrimination and Protection of Minorities of the Commission on Human Rights (E/CN.4/Sub.2/412 (vols. I-IV) and Corr.1), the Independent Expert is of the view that more work is needed to better understand whether, and how, to prevent and minimize the risk that private and official financial assistance may be provided to Governments and non-State actors committing gross human rights violations. This work could include quantitative and qualitative academic research on the link between debt and human rights violations, and country studies and recommendations on the use of financial instruments to prevent, halt or minimize gross human rights violations, as well as access to justice in this regard.

18. Transition to peace poses a great political, legal, economic and institutional challenge in terms of holding State and non-State actors accountable for their roles during conflict periods. In those cases in which lenders and other economic actors may have financially contributed to the success of Governments that grossly violated human rights, transitional justice mechanisms may be adopted and/or adapted to incorporate those financial actors into the quest for truth, justice, memory, reparation and non-repetition. In addition, as there are bound to be arguments for a clean slate after internal conflicts, it is worth tracking and useful to identify best practices or emerging custom in this respect. Contributing to both conceptual discussions and advice to countries going through transitional periods is among the challenges for this mandate.

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[2] In this context the Special Rapporteur on the right to food presented guiding principles on human rights impact assessments of trade and investment agreements (A/HRC/19/59/Add.5) to the Human Rights Council in 2011.

19. As a better understanding of the links between gross human rights violations and sovereign financing is linked not only to the right to the truth but also to the prevention of abuses, intellectual exchanges with international financial institutions, private lenders, United Nations organs and civil society actors working on those issues will be encouraged.

F. Impact of illicit financial flows on the enjoyment of human rights

20. The Independent Expert was requested by the Human Rights Council in its resolution 25/9 to undertake an additional study on the effects of illicit financial flows in the context of the post-2015 development agenda of the United Nations. This follows an earlier request made by the Council to the previous mandate holder to submit an in-depth study on the impact of non-repatriation of funds of illicit origin on the enjoyment of human rights to the Council (see resolutions 19/38 and 22/12 and documents A/HRC/22/42 and Corr.1 and A/HRC/25/52).

21. In order to carry out the study, illicit financial flows need to be further defined and their volume, origins and destinations studied. In addition, as systematic approaches to address the problem will be needed, it is not sufficient to look at success on a case-by-case basis only; it is important to focus on the identification and systematization of human rights effects of non-repatriation of illicit funds, which reduce developing countries' resources and capacities to fulfil the civil, political, economic and social rights of citizens, and feed global poverty and inequalities. It is also necessary to pay attention to the causes and structural roots that facilitate and promote illicit financial flows in countries of origin and countries of destination of such flows. As a general principle, more transparency in financial markets, including more and better information and access to information, seems to be needed in order to design effective and/or improved instruments to prevent illicit financial flows and their negative human rights spillover effects. Related analytical work and the formulation of advice will be carried out by the Independent Expert.

22. In this context, the United Nations Convention against Corruption, as well as the development of international human rights law (including the debate about extraterritorial obligations) applicable to corporations, will be highly relevant to efforts to minimize illicit financial outflows. Collaboration with domestic and international organizations and entities working on these issues, including the Working Group on business and human rights, will be a priority.

23. For countries in transition, the repatriation of stolen assets poses an even greater challenge. Rectifying instances of corruption, embezzlement and cronyism can be crucial for the achievement of broad goals of transitional justice.

V. Working methods

A. Participation in international forums and in the post-2015 development agenda

24. The Independent Expert is eager to participate in international forums to highlight the importance of international human rights law for debt relief, debt restructuring, adjustment policies and tackling illicit financial flows. This includes

seeking to contribute to discussions carried out by Bretton Woods institutions, national and regional development banks, including the CAF Development Bank of Latin America, States and groups of States, such as the Group of 20, the Group of 24, the Group of 77, the group comprising Brazil, the Russian Federation, India, China and South Africa, including its recent decision to establish a new development bank,[3] the Paris Club, the Organization for Economic Cooperation and Development, United Nations agencies, national authorities, civil society organizations, the private sector and academia.

25. Engaging in genuine dialogue with other stakeholders will mutually improve the intellectual and political tools that each participant can leverage to address debt issues. In addition to human rights law, other parts of general public international law can potentially lend its universality in order to build and foster global consensus around those issues.

26. The Human Rights Council, in its resolutions 25/9 and 25/16, requested the Independent Expert to pay particular attention to the United Nations development goals and its post-2015 development framework. An active role in the international discussion on the post-2015 development agenda is therefore crucial. The Independent Expert will thus seek to add his voice to the discussions about the post-2015 development agenda and its implementation, focusing on the effect of sovereign debt on social, economic and cultural rights and the impact of illicit financial flows on countries' development. He is also eager to participate in the third International Conference on Financing for Development.

B. Enhancing dialogue with all stakeholders, including the private sector

27. In line with Human Rights Council resolution 25/16, in which the Council urged international organizations, international financial institutions, non-governmental organizations and the private sector to cooperate fully with the Independent Expert in the discharge of his or her mandate, all relevant stakeholders will be invited to participate in the work of the Independent Expert. Collaboration and consultation with civil society actors will continue to be a priority. Given the current composition of global sovereign debt, engaging the private sector in the work of the mandate holder is particularly desirable. The mandate holder will seek to contribute to strengthening good practices in relation to responsible lending by the private financial sector on the basis of the Guiding Principles on business and human rights (A/HRC/17/31, annex) and on foreign debt and human rights (A/HRC/20/23, annex). Taking into consideration the number of creditors that, on the one hand, actually accept debt restructuring proposals and, on the other, follow the instructions of the Security Council when imposing economic sanctions, it is submitted that lenders are, to a significant extent, aware of the political, if not legal, limits that international law imposes on proposals to resolve debt issues.

[3] See the Fortaleza Declaration and Action Plan and the Agreement on the New Development Bank, adopted at the sixth summit of Heads of State and Government of Brazil, China, India, the Russian Federation and South Africa, held on 14-16 July 2014. Available from http://brics6.itamaraty.gov.br.

28. Contributing through a pluralistic debate to create a clearer picture of how sovereign financing affects human rights may offer lenders a more compelling, sophisticated and complete set of data. Such data can be incorporated into their reasoning and financial decisions. They can then meet human rights standards without being exposed to major legal risks while enhancing political, economic and social conditions for sustainable growth and good businesses. Identifying responsible human rights practices in this field that may contribute to the stability of transactions, as well as improving transparency and predictability, would also be useful.

C. Country visits

29. Country visits and interactions with government officials at the national and local levels, national human rights institutions and civil society can serve as a means of assisting Governments in meeting their development goals, implementing international human rights standards, gathering information to better understand the details of each country's interactions between finance and human rights, generalizing lessons learned for future proposals, remedying abuses in the public interest and establishing the foundation of an effective civil society. They also offer an opportunity to identify good practices and learn more about how States have dealt with particular human rights challenges relating to the mandate.

D. Broad dissemination of information, advice and advocacy

30. Besides the information gathering and conceptual work to be done, the Independent Expert will seek effective ways to disseminate information about mandate-related work and ideas and encourage their discussion. This includes using the mandate holder's website, preparing working papers, submitting thematic reports to the Human Rights Council and the General Assembly and using other agencies' platforms.

31. The Independent Expert may submit advice covering specific cases or negotiations or present general and specific human rights opinions on debt management, debt relief and debt restructuring or the implementation of adjustment policies. If necessary, or requested, he may comment on draft laws and regulations or raise his concerns through other established working methods of special procedures, such as communications or public statements.

E. Concern for particular affected groups

32. The Independent Expert will continue to focus on the impact that debt and adjustment policies have on people living in poverty, women, children, persons with disabilities, indigenous people, migrants, minorities and others. He will analyse how foreign debt and related policy reforms affect members of society differently, in particular those belonging to marginalized groups, and continue to integrate a gender perspective in the work of the mandate holder (see the report of the previous Independent Expert contained in document A/67/304).

F. The need for empirical evidence, legal research and micro-macro considerations

33. In order to make international human rights standards more compelling, effective and enforceable, the Independent Expert will pay special attention to empirical data and causation in order to identify the negative impacts on human rights in financial contexts. Given the wide range of human rights positively and negatively affected by debt and the complexities posed by the links between debt and human rights, the study of each topic presented in the workplan will include a reflection on the specific human rights principles and norms implicated by those links, paying special attention to the Guiding Principles on foreign debt and human rights (A/HRC/20/23, annex).

34. Human rights law tends to take a microlevel approach to human rights violations, as human rights law is actor-oriented and fulfilling human rights obligations is about allocating responsibilities. The Independent Expert will integrate and complement this human rights microlevel causal link perspective with a macrolevel approach, carrying out holistic and interdisciplinary studies that consider the broad context and driving forces that shape sovereign debt and human rights. Without such analyses, financial behaviours that have a serious negative impact on populations would inevitably, and sadly, go unnoticed in human rights law discussions.

G. Collaboration with other human rights mechanisms and the Office of the United Nations High Commissioner for Human Rights

35. In discharging his mandate, the Independent Expert will collaborate with all relevant human rights mechanisms at the international, regional and national levels, including other special procedures established by the Human Rights Council, treaty bodies, such as the Committee on Economic, Social and Cultural Rights, and national human rights institutions.

36. The work of the Independent Expert is highly relevant to the thematic priority of the United Nations High Commissioner for Human Rights to integrate human rights in development and the economic sphere.[4] The work of the Independent Expert will aim to contribute to integrating international human rights principles and standards in finance and investment policies, including by exploring cooperation with the World Bank, the International Monetary Fund, regional development banks, pertinent United Nations agencies and organs and other relevant actors. As part of his work, he will advocate for the mobilization of maximum available resources to promote the progressive realization of all human rights, including through the employment of innovative forms of financing for development and the promotion of a human rights-based approach to fiscal policy and development assistance.

[4] See the OHCHR Management Plan 2014-2017, pp. 62-71. Available from www2.ohchr.org/english/ohchrreport2014_2017/omp_web_version/index.html#/home.

VI. Conclusions

37. **The workplan of the Independent Expert on the effects of foreign debt and human rights will focus on several issues that, despite their great importance, have received limited international attention from a human rights perspective. These include preventive measures to avoid debt crisis and associated negative human rights impacts; good practices in dealing with debt crisis to avoid retrogressive measures in the realization of economic and social rights; the role of human rights in debt restructurings; debt disputes in the context of bilateral investment treaties; lending to States and non-State actors involved in gross human rights violations; and the impact of illicit financial flows on the enjoyment of human rights.**

38. **The Independent Expert will promote human rights accountability and monitoring, including through guidance on human rights impact assessments to protect against and provide remedies for any negative human rights impacts of finance and investment policies, and promote and support the participation of rights holders in the design and monitoring of public policies, budgets and development projects, including austerity measures.**

39. **Part of his human rights mainstreaming activities will be devoted to helping to integrate human rights in relevant United Nations policies and programmes in the context of the post-2015 agenda framework currently under discussion.**

40. **He is convinced that putting human rights at the heart of development and financial policies not only is the right thing to do from a normative perspective but will also lead to much better and more sustainable results for economic, social and human development.**

United Nations A/69/274

General Assembly

Distr.: General
7 August 2014

Original: English

Sixty-ninth session
Item 69 (b) of the provisional agenda*
Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms

The right to adequate housing

Note by the Secretary-General

The Secretary-General has the honour to transmit to the members of the General Assembly the report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, Leilani Farha, submitted pursuant to Human Rights Council resolutions 15/8 and 25/17.

* A/69/150.

14-58890 (E) 270814

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Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context

Summary

The present report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, is submitted pursuant to Human Rights Council resolutions 15/8 and 25/17. Because the Special Rapporteur commenced her mandate only on 2 June 2014, the report is preliminary in nature, outlining some of the central opportunities and priorities about which she wishes to consult with States, civil society and other relevant stakeholders as she continues to prepare her plan of work.

The report also reflects on the valuable work undertaken by the two previous mandate holders and surveys key advances made in the first 14 years of the mandate. It then offers preliminary thoughts about the current status of the right to adequate housing and highlights priority areas in which the Special Rapporteur hopes that further advances can be made.

I. Introduction

1. The present report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, is submitted pursuant to Human Rights Council resolutions 15/8 and 25/17. Since the Special Rapporteur took up her mandate on 2 June 2014, the report is preliminary in nature, outlining some of the central opportunities and priorities about which she wishes to consult with States, civil society and other relevant stakeholders as she continues to prepare her plan of work.

2. In this, her first report to the General Assembly, the newly appointed Special Rapporteur shares preliminary observations and reflections on the right to adequate housing globally and ideas on how she intends to address key issues through the mandate. The Special Rapporteur will build upon the valuable work of her predecessors as well as other relevant human rights mechanisms, and will follow up on some key initiatives already under way. At the same time, the Special Rapporteur intends to orient the mandate in new directions to further assist States, civil society and other stakeholders, including private actors, in developing an understanding of what it means to effectively implement the international human right to adequate housing. She aims to emphasize ways in which to address ongoing and emerging challenges, to identify new opportunities and to ensure concrete advances towards the full realization of the right to adequate housing.

II. Brief history of the mandate

3. The mandate of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, was established by the Commission on Human Rights at its fifty-sixth session (see resolution 2000/9).

4. At the creation of the mandate, the Commission underlined the cross-cutting nature of the right to adequate housing, situating that right in the context of the rights to an adequate standard of living and to non-discrimination and referring to a range of international human rights instruments recognizing the right to adequate housing.[1]

5. In December 2007, the Human Rights Council, in its resolution 6/27, reviewed the mandate of the Special Rapporteur on adequate housing and decided to extend it for a period of three years. Since then, the mandate has been extended by the Council two more times: in 2010, through resolution 15/8, and in 2014, through resolution 25/17.

[1] Resolution 2000/9 referred to, inter alia, article 25.1 of the Universal Declaration of Human Rights, article 11.1 of the International Covenant on Economic, Social and Cultural Rights, article 27.3 of the Convention on the Rights of the Child, article 14.2 (h) of the Convention on the Elimination of All Forms of Discrimination against Women and article 5 (e) of the International Convention on the Elimination of All Forms of Racial Discrimination. An updated list of international human rights treaties currently applicable would include articles 43.1 (d) and 43.3 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families and articles 9.1 (a), 19 (a) and 28 of the Convention on the Rights of Persons with Disabilities.

6. In these resolutions, the Council has requested the Special Rapporteur to:

(a) Promote the full realization of the right to adequate housing;

(b) Identify challenges, obstacles, gaps in protection and best practices;

(c) Emphasize practical solutions with regard to implementation;

(d) Apply a gender perspective;

(e) Pay special attention to the needs of persons in vulnerable situations as well as those belonging to marginalized groups;

(f) Facilitate the provision of technical assistance;

(g) Work in close cooperation with other special procedures, United Nations bodies, treaty bodies and regional human rights mechanisms;

(h) Submit annual reports to the Council and the General Assembly.

7. On 2 June 2014, Leilani Farha started her tenure as Special Rapporteur. She is deeply appreciative of the work of her predecessors, Raquel Rolnik (2008-2014) and Miloon Kothari (2000-2008). They made significant contributions to the advancement of both the understanding and the effective implementation of the right to adequate housing, drawing attention to the experiences of individuals and communities facing evictions and insecure tenure and those engaged in other housing struggles. They shed light on acute human rights situations in which the right to adequate housing was at stake and significantly advanced the understanding of that right by giving audience to groups previously unheard from and engaging with those living in diverse circumstances.

8. The mandate on adequate housing has come a long way. It has examined an ample range of issues in dialogue with States and other relevant stakeholders, through thematic reports, country missions, working visits, guidance tools, expert consultations and events, and urgent appeals and allegation letters.

9. Addressing forced evictions and enhancing security of tenure have been central themes of the mandate; hence, the subject of extensive consultation and substantive studies. Both former Rapporteurs developed practical tools for assisting States, those affected by forced evictions and other actors in gaining a better understanding of the relevant human rights principles and their concrete application. Two important guidance tools were produced: the basic principles and guidelines on development-based evictions and displacement (2007) (A/HRC/4/18, annex I), and the guiding principles on security of tenure for the urban poor (2014) (see A/HRC/25/54).

10. Ms. Rolnik focused on the crisis of tenure insecurity in an increasingly urbanized world. Following extensive research and consultations, she proposed 10 principles to provide practical guidance for policymakers to be applied according to specific country contexts. The current Special Rapporteur intends to follow up on this important work and will encourage States to implement the guiding principles on security of tenure for the urban poor.

11. The previous Special Rapporteurs also considered the housing conditions and experiences of members of vulnerable and marginalized groups. In this regard, the mandate holders focused in particular on women and adequate housing in a series of meetings and reports. As requested by the Commission on Human Rights in its

resolution 2002/49. Mr. Kothari carried out substantive work between 2002 and 2006 on women's equal ownership of, access to and control over land and equal rights to own property and to adequate housing. He also undertook a thematic study on discrimination. In 2011, Ms. Rolnik followed up on that body of work, devoting a thematic report to the issue of legal and policy advancements in the area of women's right to adequate housing (A/HRC/19/53).

12. Through country mission reports and communications, attention was also paid to particular groups of people who have been disproportionately affected by inadequate housing and homelessness, such as persons with disabilities, indigenous peoples, children, migrants, lesbian, gay, bisexual and transgender persons, Roma communities, and persons and communities living in situations of poverty and exclusion. The previous Rapporteurs also expressed concern about discrimination faced by ethnic and religious minorities and nomadic groups.

13. The mandate has recently addressed a number of other important and emerging thematic issues, including:

(a) The global financial crisis;[2]

(b) Housing policy options including homeownership, rental and cooperative housing;[3]

(c) Post-disaster and post-conflict reconstruction;[4]

(d) The impact of major international sports events (mega-events);[5]

(e) Climate change.[6]

III. Preliminary reflections: the implementation gap

14. The right to adequate housing has been the focus of extensive commentary. It was the subject of two general comments (Nos. 4 and 7) by the Committee on Economic, Social and Cultural Rights before any other Covenant rights were similarly interpreted, and it is now one of the most considered economic, social and cultural rights. At the same time, as we move into the fifteenth year of the mandate and despite considerable efforts by civil society to ensure its realization, the well-elaborated norms and commentary on this right have not necessarily been translated into substantive progress.

15. The global extent of the phenomenon of homelessness is neither well known nor well documented. Global figures are scarce, and country-specific data are often incomplete and usually not comparable with those of other countries owing to differences in definitions and methodologies. The Special Rapporteur is concerned that at the domestic level, this statistical invisibility of a population can mean its neglect in the design of public policy and an absence of adequate responses. At the global level, it may conceal an acute global human rights crisis being faced by millions.

[2] See A/HRC/10/7.
[3] See A/67/286 and A/68/289.
[4] See A/66/270.
[5] See A/HRC/13/20.
[6] See A/64/255.

16. The evidence that is available suggests that widespread homelessness and inadequate housing persist and may in fact be on the rise. The United Nations Human Settlements Programme (UN-Habitat) has documented that the number of people living in slums has steadily increased over the past few decades, from approximately 650 million in 1990 to 863 million in 2012. According to this information, slums are characterized by severe overcrowding, a lack of basic services, including water and sanitation, and housing units that fail to protect against inclement weather and otherwise preventable diseases. The proportion of people living in such conditions is considerably higher in such regions as sub-Saharan Africa (62 per cent) and South Asia (35 per cent), compared with Latin America and the Caribbean (24 per cent) and North Africa (13 per cent).[7]

17. Widespread homelessness and inadequate housing are not restricted to States with struggling economies. As pointed out by the Committee on Economic, Social and Cultural Rights in its general comment No. 4, significant problems of homelessness and inadequate housing also exist in some of the most economically developed societies, an observation mirrored by Miloon Kothari in his 2005 report on homelessness (E/CN.4/2005/48). The Special Rapporteur is concerned that the spectre of widespread and, in many cases, increasing homelessness in the most developed countries and countries suffering from grossly unequal distribution of wealth suggests a serious dissonance between prevailing models of economic development and the realization of the right to adequate housing that is global in scope.

18. The consequences of inadequate housing and homelessness are severe, with implications for almost every other human right, including the rights to health, education, protection of the family, social security, work and, in many cases, life. Malaria, cholera, dengue fever and many other diseases that continue to ravage the poor in tropical countries are closely linked to poor housing conditions, as are tuberculosis, pneumonia and many other illnesses affecting those who are homeless in northern climates. Yet, despite the severity of the consequences and the fundamental human rights that are involved, homelessness and inadequate housing are still often seen as the preserve of socioeconomic policy and as insulated from the kind of legal human rights accountability that is applied to government policies affecting other human rights. Even when housing is recognized as a human right, how it should be implemented is not always clear to States and other stakeholders.

19. The growing gap between the norms and standards that have been developed internationally and the realities of systemic homelessness, substandard housing conditions, unaffordable rentals and lack of access to adequate housing suggests to the Special Rapporteur a crisis of commitment to or understanding of effective implementation of the right to adequate housing. In this light, the Special Rapporteur considers it imperative for her work that concerted effort and emphasis be placed on how human rights norms related to housing can be transformed into domestic law and policy and made more effective in addressing the human rights crisis of homelessness and inadequate housing that continues to exist in many countries around the world.

[7] United Nations, *The Millennium Development Goals Report 2014*, target 7.D.

IV. Thematic and substantive priorities

A. Supporting national-international interaction

20. In her collaborative work with other practitioners at the domestic and international levels, the Special Rapporteur has learned of the importance of sustaining a dynamic interconnection between activities at the national level and those at the international level. If international human rights norms and standards are to be made meaningful and effectively implemented at the national level, they must be developed and interpreted in the context of national experiences and benefit from advances made in domestic law and practice. Similarly, domestic human rights must be nurtured and strengthened by the substantive norms and universal principles developed at the international level.

21. Over the past two decades, the understanding of the right to adequate housing in international human rights has benefited significantly from activities carried out at the national level. National movements and campaigns have emerged to address fundamental issues related to housing, including: sustainable development, land rights, security of tenure, homelessness, large-scale development projects, mega-events, the erosion of social housing, the impact of the financial crisis, and the denial of services essential for the adequacy of housing.

22. More than ever, civil society organizations are applying international human rights principles to specific national circumstances and using the United Nations human rights system, including treaty monitoring bodies and the universal periodic review, to promote the development of authoritative interpretations and applications of the right to adequate housing that address national and local challenges and clarify States' human rights obligations in these contexts.

23. Civil society organizations have brought new and diverse housing issues before the Committee on Economic, Social and Cultural Rights, and also before the Human Rights Committee, the Committee on the Elimination of Racial Discrimination, the Committee on the Rights of the Child, the Committee on the Elimination of Discrimination against Women, the Committee on the Rights of Persons with Disabilities and the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families. By doing so, they have encouraged various treaty monitoring bodies to consider State obligations with respect to the right to housing in diverse circumstances and to clarify the links between the right to housing and other human rights.[8] These dynamic interactions between national experiences and international human rights mechanisms benefit and strengthen both.

24. A crucial aspect of the national-international interaction that has occurred in recent years has been the challenge of ensuring access to justice for claimants of the right to adequate housing. The number of legal cases involving the right to adequate housing that have been brought before domestic courts and regional and international bodies has grown in recent years. And courts are increasingly relying on international human rights norms in the adjudication of housing rights cases.

[8] See, for example, E/C.12/PRY/CO/3, CRC/C/TLS/CO/1, CRC/C/DZA/CO/3-4 and CERD/C/AZE/CO/6.

General comments Nos. 4 and 7 of the Committee on Economic, Social and Cultural Rights, for example, have been referred to by courts in several domestic cases.[9]

25. At the same time, advances made by domestic courts and national human rights institutions have informed positive developments in international human rights. For example, the experience of national courts and the content of national-level housing rights jurisprudence significantly informed the content and structure of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, which provides, for the first time, for the adjudication of the right to adequate housing under the Covenant.[10]

26. Ensuring access to justice for claimants of the right to adequate housing has emerged as a central and shared challenge for States and treaty bodies. Meeting that challenge will continue to require ongoing dialogue and interaction between States, including domestic courts, and international human rights bodies and procedures.

27. The Special Rapporteur will solicit input from States, treaty bodies, national human rights institutions, civil society organizations, judges and human rights practitioners in considering how the mandate can support the critical dialogue between domestic and international human rights norms and practice. She also hopes to lend visibility to the work being undertaken to elaborate the content of the right to adequate housing at all levels and encourage advances in ensuring access to justice in relation to that right. She is committed to fostering and enhancing the interdependence of national and international law and practice in all aspects of her work, including communications, country visits and thematic reports.

B. Clarifying the obligation of progressive realization

28. Having considered emerging socioeconomic patterns affecting the right to adequate housing, the important work of many stakeholders and developments in the field of economic, social and cultural rights more generally, the Special Rapporteur commences her mandate with an understanding of several key challenges in the implementation of the right to adequate housing, and a recognition of emerging opportunities, that she hopes to address and engage as she undertakes further consultations.

29. Central to State obligations with respect to the right to adequate housing is the obligation to take positive measures to realize that right. According to article 2.1 of

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[9] See, for example, European Committee of Social Rights, Complaint No. 39/2006, *European Federation of National Organizations Working with the Homeless (FEANTSA) v. France*, decision on the merits of 5 December 2007; High Court at Embu, Constitutional Petition No. 2 of 2011, *Ibrahim Sangor Osman and Others v. the Hon. Minister of State for Provincial Administration and Internal Security and Others*; and European Committee of Social Rights, Complaint No. 15/2003, decision on the merits of 8 December 2004, *European Roma Rights Center v. Greece*. See also A/63/275, chap. IV.

[10] Aspects of the High Court of South Africa case *Government of the Republic of South Africa and Others v. Grootboom and Others* significantly informed the development of article 8.4 of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, which enunciates the "reasonableness standard". See: "Reasonableness and Article 8(4)", in *The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: A Commentary* (forthcoming) at http://www.jus.uio.no/smr/english/about/programmes/serp/research/optional-protocol-.html.

the International Covenant on Economic, Social and Cultural Rights, the State is obliged to take steps, through international assistance and cooperation, to the maximum of its available resources, with a view to achieving progressively the full realization of the right by all appropriate means, including particularly the adoption of legislative measures. Historically, however, the obligation of States to take steps or positive measures to realize the right to adequate housing has not received as much attention in the development of legal norms as other aspects of States' obligations. Legal norms have focused more often on State action that interferes with the right to adequate housing. As a result, at the international level there is more clarity about legal norms applied to forced evictions and comparatively less about the positive obligation to address homelessness or to allocate the resources necessary to ensure access to housing for marginalized groups. Similarly, domestic courts tend to deal with more cases and develop more jurisprudence on evictions and service disconnections than on failures to prioritize the development of services for informal settlements.

30. There are, of course, particular challenges for international human rights bodies and domestic courts in developing precise requirements for compliance with the obligation of the progressive realization of the right to adequate housing. Obligations of this sort must be assessed in relation to contextual, legal and historical factors such as available resources, competing needs, economic policy and international assistance. There is no simple formula for defining the precise legislative measures that are required or for ascertaining the necessary budgetary allocations. However, the fact that compliance with these aspects of the right to adequate housing can be assessed only in the context of particular circumstances should not lead to a lack of human rights accountability or to the ignoring of violations.

31. The nature of State obligations in different circumstances must be clarified through procedures and mechanisms through which obligations can be assessed in context. Just as legal norms governing security of tenure and evictions are clarified through adjudication in particular circumstances, so too the obligations linked to progressive realization, such as maximum available resources and appropriate legislative measures, must be fleshed out by human rights bodies and courts to clarify their meaning in particular circumstances.

32. One of the most significant advances in both domestic and international law in recent years has been the recognition that all aspects of the right to adequate housing and other economic and social rights are justiciable.[11] Debates about the justiciability of economic, social and cultural rights, in particular the obligation of progressive realization, are now, thankfully, behind us. Domestic courts and regional bodies have demonstrated that all components of economic and social rights can be competently adjudicated. Accordingly, a comprehensive approach to access to justice was affirmed in the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, adopted by the General Assembly on the sixtieth anniversary of the Universal Declaration of Human Rights.[12] The

[11] See General Assembly resolution 63/117.

[12] See Catarina de Albuquerque, "Chronicle of an announced birth: The coming into life of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights — The missing piece of the International Bill of Human Rights", in *Human Rights Quarterly*, vol. 32, No. 1 (2010); see also Bruce Porter, "The reasonableness of article 8 (4) — Adjudicating claims from the margins", in *Nordic Journal of Human Rights*, vol. 27, No. 1 (2009).

communications procedure covers all aspects of the rights set out in the Covenant, including the obligations linked to progressive realization under its article 2.1.

33. The Special Rapporteur intends to ensure that her mandate builds on the comprehensive and fully inclusive approach to access to justice in relation to the right to adequate housing. She will ensure that her mandate continues to address concerns arising from forced evictions, demolitions, displacement and other State actions, but she intends to place a particular focus on explaining and clarifying the obligation of States to take reasonable steps, including appropriate legislative measures, towards the full realization of the right to adequate housing.

34. The Special Rapporteur will also consider ways in which the mandate can support access to justice in relation to all aspects of the right to adequate housing. She recognizes that ensuring access to justice, particularly with respect to claims involving the obligation of States to take positive measures towards the realization of the right to adequate housing, presents new challenges. Courts and human rights bodies need to be provided with reliable evidence concerning resource constraints and competing needs. More participatory approaches to the adjudication of rights need to ensure that all stakeholders, including marginalized groups, are able to have their voices heard. Governments need to put accountability mechanisms in place, and to work in partnership with claimants and other stakeholders to improve policies and ensure effective remedies. Researchers and international monitoring groups need to further develop methodologies for providing statistics and reliable indicators of compliance with all aspects of the right to adequate housing.

35. Often, States have no effective mechanisms in place for the assessment of housing programmes or policies, budgetary decisions or administrative decisions in terms of compliance with the right to adequate housing. Vulnerable groups must have access to procedures through which they can identify and seek redress for potential violations of their rights.[13] As the Special Rapporteur on extreme poverty and human rights has noted, the lack of judicial review or complaints mechanisms for social policy, compounded by a lack of justiciability of economic, social and cultural rights at the domestic level, creates the perception that social policy is a charitable measure rather than part of an obligation to ensure the enjoyment of human rights. The recognition of rights imposes the obligation to establish judicial or other remedies that enable rights holders to invoke their protection in courts, or before other similarly independent bodies, when they are infringed.[14]

C. Equality, non-discrimination and the right to adequate housing

36. The Special Rapporteur is deeply concerned about the discrimination and inequality in housing experienced by various individuals and groups, especially those most marginalized and vulnerable to rights violations. Indigenous peoples, persons with disabilities, particular groups of women (such as women with children and older women), migrants, ethnic and racial minorities, and many other marginalized groups continue to be disproportionately affected by homelessness and inadequate housing.

[13] A/67/278, para. 31.
[14] Ibid., para. 32.

37. In order to be effective, strategies to address violations of the right to adequate housing must be based on an equality rights framework and must address the systemic patterns of discrimination and inequality that deprive particular groups of equal enjoyment of that right. Despite the considerable progress made at both the national and international levels on the interpretation and understanding of non-discrimination and equality, the relationship between those concepts and their importance for the implementation of the right to adequate housing are still not well understood.

38. The principle of non-discrimination is a pillar of international human rights law. It is well recognized that equality and non-discrimination are cross-cutting, applying to all human rights.[15] The non-discrimination obligation is of immediate application. States are obliged to refrain from discrimination in laws and policy and to provide adequate constitutional or legislative protections from discrimination under domestic law.[16] Concrete, deliberate and targeted measures are required in order to ensure that discrimination is eliminated.[17]

39. The meaning and the application of non-discrimination and equality in the context of economic, social and cultural rights have been described in a variety of international human rights documents.[18]

40. Significant advances in terms of understanding how non-discrimination and equality apply to the right to adequate housing have emerged from work that has been undertaken on women and housing. In addition to the groundbreaking work carried out on this issue by both previous Special Rapporteurs, as described above, other contributions have been made by United Nations agencies.[19] Civil society organizations have also played a central role in elaborating the content and scope of women's right to adequate housing.

41. Work that has been done on equality and non-discrimination in relation to other groups, such as persons with disabilities and migrants, has also advanced understanding of the intersection of equality and non-discrimination with economic, social and cultural rights, including housing.

42. Disability rights organizations have articulated a "social model" of disability (as opposed to a medical model) that addresses systemic social barriers to equality, ensures full and effective participation and inclusion in society, and recognizes that non-discrimination includes the right to reasonable accommodation. The principles have been incorporated into the Convention on the Rights of Persons with Disabilities, which the Special Rapporteur views as a significant development with

[15] Article 2.1 of the International Covenant on Civil and Political Rights and article 2.2 of the International Covenant on Economic, Social and Cultural Rights are identical in this regard. In addition, article 26 of the International Covenant on Civil and Political Rights guarantees equality before the law without any discrimination.

[16] A/HRC/23/50, para. 78.

[17] E/C.12/GC/20, para. 36.

[18] See, for example, E/C.12/2005/4, E/C.12/GC/20, CEDAW/C/2004/I/WP.1 and A/HRC/26/39).

[19] See, for example, UN-Habitat, *Policy Makers Guide to Women's Land, Property and Housing Rights Across the World* (2007) and "Women's equal rights to housing, land and property in international law" (2007); see also Office of the United Nations High Commissioner for Human Rights (OHCHR), *Women and the Right to Adequate Housing* (2012); and OHCHR and United Nations Entity for Gender Equality and the Empowerment of Women (UN-Women), "Realizing women's rights to land and other productive resources" (2013).

respect to the right to adequate housing. Unlike any other treaty, the Convention encompasses the rights to non-discrimination and substantive equality as well as economic and social rights, including the right to adequate housing. Moreover, the Convention includes unique provisions regarding "access to justice" and "national implementation and monitoring" to ensure that principles of substantive equality are fully implemented through domestic law and policy.

43. Migrant workers have also made important advances in addressing discrimination in economic and social contexts, such as discrimination based on citizenship or immigration status, including "undocumented" status. Migrant domestic workers, migrant construction workers (for example, those working in extractive industries or large-scale infrastructure projects), children, older migrants and migrants in irregular situations are the most vulnerable, often lacking administrative or judicial remedies for their housing claims. Migrant workers and the members of their families frequently face housing conditions characterized by overcrowding, irregular or unregulated rental markets, high exposure to arbitrary changes in the cost of rent or essential services, and substandard living conditions, and can be subject to abuse, in particular when they are undocumented.

44. A number of key principles of non-discrimination and equality in the context of economic and social rights and international human rights law are of particular relevance to the right to adequate housing: (a) discrimination is prohibited whether it be direct (for example, a law or policy explicitly bars women from obtaining loans in order to purchase housing) or indirect (for example, in order to provide credit for the purchase of housing, a bank requires that borrowers have a type of collateral or specific employment references that many women and migrants, particularly if they are undocumented, are unable to provide); (b) it is the effect of a law or policy rather than its intent that should be the focus of discrimination analysis; and (c) discrimination and inequality can occur equally in the private and public spheres, and States have the obligation to prevent and provide remedies to discrimination, regardless of where it occurs.

45. It is also widely accepted that equality and non-discrimination must be achieved substantively, not merely formally.[20] This means recognizing that vulnerable groups are situated differently, that their differences need to be accommodated in laws, policies and programmes, and that States and other actors have a positive obligation to address and remedy systemic patterns of inequality.

46. A number of developments related to the grounds of discrimination have emerged under international human rights law. For example, the unique effects of "multiple discrimination" (such as the experience of women belonging to racial or ethnic minority groups) have now been recognized as requiring specific consideration and remedies. In addition, the ground of "economic and social situation", including homelessness and poverty, is now understood as a distinct ground of discrimination. It is recognized that those facing discrimination in access to housing because of ethnic origin, sex or disability, for example, are often subject to further stigmatization, discrimination and criminalization because of their socioeconomic and housing status, such as living on the streets, in informal settlements or in substandard housing.

[20] See E/C.12/2005/4 and E/C.12/GC/20; see also E/2008/76.

47. It is imperative that these fundamental principles of equality and non-discrimination in relation to economic and social rights be rigorously applied in the area of housing. Prevailing patterns of inequality and exclusion in housing are often linked to indirect and unintentional forms of discrimination, to failures to accommodate the needs of various marginalized groups, and to inadequate attention to the obligations linked to substantive equality.

48. The fact that the rights to non-discrimination and equality in housing may require positive obligations to address and ameliorate existing patterns of disadvantage is often ignored. Much more can be done to ensure that the principles of non-discrimination and equality are fully incorporated into housing policies, programmes, legislation and budgetary allocations.

49. Substantive equality obligations in terms of housing are often linked to the obligation to progressively realize the right to adequate housing. Overcoming systemic patterns of discrimination and inequality with regard to people with disabilities, displaced persons, women with children and other groups relies on the implementation and development of programmes and strategies over time. Reasonable accommodation, as is the case with progressive realization, is subject to limitations linked to available resources. The Special Rapporteur intends to consider how these principles of non-discrimination and equality apply to the housing experiences of particular vulnerable groups.

D. Engaging the evolving nature and role of the State

50. Under international human rights law, it is the State that is held responsible for the compliance with international human rights to which it is bound. The focus of monitoring and constructive dialogue at the international level has been on national Governments.

51. National Governments, however, cannot be viewed as the only relevant actors with respect to the implementation of international human rights. Subnational governments, including state/provincial and municipal governments, often have significant authority with respect to housing and therefore share responsibility for implementing the international human rights responsibilities of the State. Involvement in the implementation of the right to adequate housing has become ever more diversified with recent patterns of the delegation of responsibilities relating to housing from the central Government to more local governments in many countries, and the increasing delegation of governmental responsibilities to public-private partnerships or private actors.

52. Moreover, global actors such as transnational corporations and multilateral or bilateral financial institutions, and United Nations agencies play significant roles in the implementation of the right to adequate housing. The actions of transnational extractive industries or development projects initiated and overseen by multiple partners, including international financial institutions, may have far-reaching effects on that right.

53. The evolving nature and diversification of the State and the multiplicity of actors who may be involved in fulfilling its obligations under international human rights law make implementation all the more complicated. In many countries, housing programmes and other policies necessary to the implementation of the right

to adequate housing, such as income support, community support for persons with disabilities, judicial oversight of security of tenure, zoning or water and sewage services may fall under the authority of subnational or municipal governments.

54. In addition, governments often engage in partnerships with private housing or service providers or community-based organizations to administer programmes. Private landlords, landowners, real estate agencies, service and utility providers and other relevant private actors have significant effects on the right to adequate housing. It has become increasingly important that these diverse actors engaged in the implementation of State obligations with respect to the right to adequate housing be fully aware of the nature and scope of these obligations. Some advances have been made at the international level towards a better understanding of the responsibilities of businesses and private actors, but the obligation of States to regulate businesses so as to ensure that their actions are consistent with the right to adequate housing is critical to the effective implementation of the right to adequate housing.

55. For many of those who are denied access to adequate housing or whose right to housing is under threat, the involvement of the national Government can appear to be extremely remote, when in fact its actual role in relation to impugned policies may be minimal. The actors with whom stakeholders are directly engaged in attempting to realize their rights are often local governments, municipalities or private owners or companies.

56. While the Special Rapporteur believes that it is important to emphasize the ultimate responsibility of States to ensure compliance with their international human rights obligations so that there is no "contracting-out" of fundamental human rights guarantees, she also recognizes that effective implementation requires that all levels and branches of government be cognizant of, and fully committed to implementing, the State's obligations. The implementation of the right to adequate housing relies on local governments, community organizations and private actors, often acting in partnership, affirming such implementation as a joint commitment and a collaborative project.

57. The Special Rapporteur is committed to seeking out proper channels through which to engage constructively with the full range of actors that play significant roles in relation to the implementation of the right to adequate housing, and hopes to provide support for the enhancement of human rights accountability at all levels of government.

V. Some priority areas of focus for the mandate

58. The Special Rapporteur aims to assist States, civil society and other relevant stakeholders in ensuring the implementation of the right to adequate housing at the domestic level by focusing on several key thematic areas in the course of her mandate.

59. As noted above, the themes and priority areas of work identified in the present report are preliminary in nature, as the Special Rapporteur wishes to continue her consultations with States and other relevant stakeholders, notably United Nations agencies, other special procedures mandate holders, civil society organizations and national human rights institutions, in order to refine her plan of work for the next

few years. Furthermore, she plans to develop each of these themes in a collaborative and participatory manner.

A. Marginalized and vulnerable groups

60. Addressing the housing conditions of persons in vulnerable situations and those in situations of exclusion and marginalization will be a priority of the mandate. The Special Rapporteur will continue to focus on non-discrimination and equality in the context of housing and ensure that all of her work is informed by the key principles of equality and non-discrimination.

61. The Special Rapporteur will also ensure that the housing conditions of women remain prominent within all aspects of the mandate. In this regard, she intends to continue the close collaboration the mandate holder has had with civil society organizations spearheading the work on women and the right to housing. She intends to cooperate with bodies within the United Nations system interested in developing a deeper understanding of women's right to adequate housing, including human rights treaty monitoring bodies, the Working Group on the issue of discrimination against women in law and in practice and other relevant special procedures.

62. Working closely with the Special Rapporteur on the rights of indigenous peoples, the Permanent Forum on Indigenous Issues and the Expert Mechanism on the Rights of Indigenous Peoples, the Special Rapporteur on adequate housing hopes to further consider the housing conditions and experiences of indigenous peoples globally and to support the development of more effective strategies for protecting and ensuring their land and housing rights.

63. Drawing on the work on stigmatization and exclusion undertaken by her predecessor and other Special Rapporteurs,[21] the Special Rapporteur on adequate housing intends to conduct research into the ways in which housing status is linked to criminalization, stigmatization and exclusion and how that problem can be addressed.

64. The Special Rapporteur intends to place some focus on the housing rights of persons with disabilities and migrant workers (and their families). To that end, she will solicit information on the housing experiences and conditions of persons with disabilities and of migrant workers with a view to identifying barriers to adequate housing and developing recommendations for action at the national level on the part of States and other relevant stakeholders.

65. In relation to persons with disabilities, the Special Rapporteur wishes to find avenues for collaborative work with the Committee on the Rights of Persons with Disabilities and the soon-to-be-appointed Special Rapporteur on the rights of persons with disabilities, to advance the understanding of the scope and nature of the right to adequate housing and the right to independent living in the light of the specific situations faced by persons with physical and mental disabilities.

66. Regarding migrant workers (and their families), the Rapporteur wishes to consider the particular vulnerabilities faced by such workers, especially if they are undocumented, in gaining access to and maintaining adequate housing and living

[21] See A/66/265 and A/HRC/21/42.

conditions, whether owing to administrative or legal obstacles or to de facto discrimination and multiple discrimination. The Special Rapporteur hopes to work collaboratively with the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and the Special Rapporteur on the human rights of migrants to assess policies, programmes and measures in relation to the right to an adequate standard of living, including housing, and to seek avenues for cooperation to ensure adequate housing and living conditions for migrant workers.

B. Homelessness

67. Homelessness is at the end of the housing spectrum and must be understood as a prima facie violation of the right to adequate housing (i.e., where any significant number of individuals are deprived of basic shelter or housing, a State is prima facie failing to discharge its international human rights obligations).[22] During her mandate, the Special Rapporteur intends to organize consultations and expert discussions to explore various dimensions of this violation of the right to adequate housing, including the obligation of the State to address homelessness.

68. The Special Rapporteur will also focus on developing a contextual analysis of the causes and consequences of homelessness as experienced in both developed countries — particularly in the light of the effects of the global financial crisis — and developing countries. She anticipates that this work will highlight the interdependence of the right to housing with the broader right to an adequate standard of living, as well as other rights such as health, social security, food and work.

69. In coordination with relevant mandate holders, the Special Rapporteur wishes to take up the problem of laws that criminalize homelessness or activities associated with homelessness, such as sleeping in public places, and to consider the discriminatory attitudes and perceptions that often lie behind such laws. In this regard, the Special Rapporteur will explore in some depth the stigmatization and discrimination often suffered by the homeless or those with other housing status (for example, "squatters", "slum dwellers" and "public/social housing tenants"), and will build upon the previous work of mandate holders, including the report of the Special Rapporteur on extreme poverty and human rights on the penalization of people living in poverty (A/66/265) and the report of the Special Rapporteur on the human right to safe drinking water and sanitation on stigma and the realization of the right to safe drinking water and sanitation (A/HRC/21/42).

C. Housing strategies based on human rights

70. The causes of homelessness and inadequate housing are multifarious, interrelated and complex. They include not only forced evictions and conflict, but also many other structural issues, such as inadequate services and infrastructure; barriers to access to credit; land speculation and zoning; displacement and migration; environmental degradation; and rapid urbanization and the development of megacities. Tackling the causes of homelessness often requires a multifaceted approach that relies on comprehensive and coordinated strategies, and is

[22] E/1991/23, annex III, para. 10.

implemented in a collaborative fashion with various levels of government and relevant stakeholders. What is needed, as a starting point, is the articulation of key principles through which multiple policies and programmes can achieve a unified purpose and a coherent approach. The Special Rapporteur believes that a human rights approach to adequate housing and homelessness has much to offer in this regard and, if implemented, can be transformational, resulting in real change rather than a temporary fix.

71. In most States, housing and homelessness are treated as a matter of policy, not as a matter of human rights, with concomitant obligations on the part of national and subnational governments, judiciaries and other actors. The development of a national housing strategy can be a critical first step and an immediate obligation in relation to the progressive realization of the right to adequate housing. The key components of a rights-based housing strategy, however, have yet to be fully articulated at the international level.

72. Through consultations and expert meetings with national and international housing rights experts, government officials, United Nations agencies, civil society representatives and parliamentarians, the Special Rapporteur will develop a thematic report in which to identify and elaborate on the key characteristics required of national housing strategies based on human rights.

73. As an adjunct to this work, the Special Rapporteur will also consider housing strategies in the context of post-disaster and post-conflict reconstruction. These issues have been at the heart of the work of the housing mandate holder in the past, and the Rapporteur is committed to continuing her engagement with key humanitarian actors whenever possible.

D. Access to justice

74. Under international human rights law,[23] ensuring access to effective remedies for violations of human rights is a critical component of States' obligations, indispensable to the full enjoyment of such rights. Thus, as with other rights, States have a positive obligation to establish institutional mechanisms and systems at the national level to ensure that all individuals and groups can claim the right to adequate housing and seek effective remedies.

75. The Special Rapporteur wishes to learn more about how the right to adequate housing can be made the subject of effective complaints procedures in domestic law and can be better integrated into housing policies and programmes through rights-based approaches. She is committed to working collaboratively with groups advocating for rights claimants, and with government officials, advocates, national human rights institutions, courts, housing policy decision makers and other stakeholders, to assist in meeting the challenges of access to justice and enhanced accountability in relation to all aspects of the right to adequate housing.

76. Within the international human rights system, with the recent advent of the optional protocols to several treaties, access to justice with respect to housing rights violations is now also a matter of international adjudication. The scope and content

[23] E/C.12/1998/24.

of standards of compliance — reasonableness, progressive realization and maximum available resources — will now be gradually clarified.

77. The Special Rapporteur is interested in building on these significant opportunities at the domestic and international levels. She will identify areas in which support and guidance are needed by Governments, courts, advocates, rights claimants and human rights institutions, with a view to supporting ongoing work at the national and international levels in this regard.

78. To this end, the Special Rapporteur expects to devote a thematic report to the issue of access to justice in relation to the right to housing. In so doing, the Special Rapporteur hopes to: (a) assess and document barriers to access to justice experienced by claimants; (b) consult with government authorities, judges and a broad range of experts on strategic litigation about challenges in ensuring access to justice; and (c) promote research and statistical analysis with a view to providing reliable evidence and indicators of compliance.

79. The Special Rapporteur wishes to organize an expert consultation as well as an open public consultation to obtain views and contributions from all relevant stakeholders about these issues. Given their relevance, she wishes to engage particularly with the judiciary and international associations of lawyers and judges.

E. Subnational governments

80. As noted above, authority over laws, programmes and services necessary to the implementation of the right to adequate housing is often spread among various levels of government and other actors. During her mandate, the Rapporteur will assess, in the context of the wide range of systems of government, how all levels of government can work effectively together to implement the State's housing rights obligations. She will also endeavour to provide guidance to enhance the capacity of subnational governments to deal with the components of the right to adequate housing that fall within their authority.

81. The Special Rapporteur will also conduct research into mechanisms that ensure that diverse actors can be held accountable for their role in the implementation of State obligations and that promote effective interaction between national and subnational governments in the realization of the right to adequate housing.

82. The Rapporteur anticipates that her work to clarify the obligations of various levels of government may shed light on practical issues regarding the human rights responsibilities of non-State actors, such as private landlords, construction and real estate companies, and service and utility providers, responsible for assisting States and subnational governments in the provision and management of housing, as well as in the provision of the utilities and services necessary to ensure the quality and habitability of housing. In this regard, she will draw on the work of her predecessors as well as that of other special procedures, such as the thematic report of the Special Rapporteur on the human right to safe drinking water and sanitation on the participation of non-State service providers in water and sanitation service delivery.[24]

[24] See A/HRC/15/31.

F. Housing as part of the global agenda

83. In the coming months, the post-2015 global development agenda will be finalized and adopted. As several independent experts have observed during consultations at the national, regional and international levels, as well as throughout various negotiations, this process has the potential to make a contribution to the enjoyment of human rights by billions of people. The Special Rapporteur shares the view that a global agenda needs to prioritize the elimination of inequalities, by enhancing social protection, participation and accountability. The Special Rapporteur will closely monitor the outcome of the remaining discussions, in particular in relation to the inclusion of housing rights and broader economic and social rights standards and accountability mechanisms in the goals and indicators of the agenda.

84. A second global event of particular relevance for the mandate holder is the United Nations Conference on Housing and Sustainable Urban Development (Habitat III) to be held in 2016. The Special Rapporteur intends to contribute to that process on the understanding that human rights can be a central and transformative component of strategies for addressing urbanization and sustainability, which present themselves now, more than ever before, as immense challenges and opportunities.

85. There are a number of issues that are global or transnational in scope and that have a direct impact on the right to adequate housing in many countries. Global actors such as transnational corporations and multilateral or bilateral financial institutions, and United Nations agencies play significant roles in relation to the right to adequate housing. The actions of transnational extractive industries or development projects, sometimes initiated and overseen by multiple partners, including international financial institutions, may have far-reaching effects on the right to adequate housing, including large-scale displacements, the destruction of sources of livelihood and forced evictions. Similarly, trade and investment agreements and investor dispute mechanisms increasingly involve important issues of public policy and often fail to ensure the consideration of fundamental rights such as the right to adequate housing. These problems have led to important work to assess and clarify issues of corporate accountability, extraterritorial obligations and human rights in relation to trade and investment agreements. The Special Rapporteur expects to be actively engaged with respect to these emerging issues as they relate to the right to adequate housing.

86. In undertaking these tasks, the Rapporteur wishes to underscore the importance of cooperation with key international actors and partners to enhance the protection of the right to adequate housing at the global level. In the coming months, the Special Rapporteur intends to devote time and effort to engaging with States in all regions, and also with United Nations agencies and entities, including UN-Habitat, the Food and Agriculture Organization of the United Nations, the United Nations Development Programme, the Office of the United Nations High Commissioner for Refugees and the Office of the United Nations High Commissioner for Human Rights.

87. The Special Rapporteur values and will continue to nurture the long-standing cooperation that the mandate holder has developed with civil society organizations, community organizations and regional and international networks around the world,

notably those with a focus on the right to housing, women's housing and land rights, the "right to the city", economic, social and cultural rights and strategic litigation and, in general, organizations focused on the living conditions of people in situations of poverty or exclusion. She also wishes to consolidate channels of cooperation with tenant associations and with emerging movements and groups that will help to ensure that the mandate addresses housing rights issues as they arise. She hopes that the mandate will also give rise to new relationships, particularly through her missions and her participation in various forums, with constituencies that play an active role in the development of their communities, such as unions and community associations.

88. Given the specific risks to which human rights defenders working in the areas of housing, land, eviction or gentrification are exposed, the Rapporteur aims to support the call for enhanced guarantees for the essential work that they carry out.

89. The Rapporteur also intends to engage in sustained work with international financial institutions that have relevant roles in funding and providing technical assistance for housing and infrastructure projects, including the World Bank, to ensure that those roles are supportive of housing rights. In a similar vein, she wishes to explore opportunities for dialogue with international cooperation and assistance agencies created by various States.

VI. Conclusions

90. **The present report has outlined a number of reflections as well as key thematic priorities for the Special Rapporteur at the start of her mandate. She will present her first thematic report to the Human Rights Council in accordance with its annual programme of work, at its twenty-eighth session. The Special Rapporteur welcomes comments, contributions and suggestions regarding the present report and looks forward to engaging in further consultation with States and all relevant stakeholders.**

United Nations A/69/275

General Assembly

Distr.: General
7 August 2014

Original: English

Sixty-ninth session
Item 69 (b) of the provisional agenda*
Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms

Right to food

Note by the Secretary-General

The Secretary-General has the honour to transmit to the General Assembly the interim report of the Special Rapporteur on the right to food, Hilal Elver, submitted in accordance with Assembly resolution 68/177.

* A/69/150.

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Interim report of the Special Rapporteur on the right to food

Summary

The present report, submitted in accordance with General Assembly resolution 68/177, constitutes the first report to the General Assembly of the new Special Rapporteur on the right to food. The report sets forth some of the issues the Special Rapporteur intends to focus on during her tenure. In particular she intends to: (a) explore the obstacles faced by those wishing to seek remedy for violations related to the right to food by analysing the current international legal framework and identifying examples of good practice as a means of encouraging States to develop judicial remedies in accordance with the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights; (b) reaffirm the key role played by women in ensuring food security by addressing gender gaps related to equal assets and productive resources; analysing the effect of unpaid care work on women's right to food; and considering the need for mainstreaming gender in all legislative frameworks, programmes and policies related to food security and nutrition; (c) focus on the nutritional dimension of national food policies and development strategies, as a means of promoting access to healthy and nutritious foods and tackling the effects of undernutrition on the most vulnerable, particularly children aged under five; (d) prioritize, as a cross-cutting issue, the relationship between climate change, the right to food and the post-2015 sustainable development agenda; (e) address the need to review international food systems as a means of improving sustainable production and consumption by way of reducing food waste; and (f) consider the impact of protracted conflicts and emergency situations on the right to food.

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I. Introduction

1. The mandate of the Special Rapporteur on the right to food was established by the Commission on Human Rights in resolution 2000/10. In September 2007, the Human Rights Council, in resolution 6/2, reviewed and extended the mandate for three years. In resolution 6/2, the Council instructed the Special Rapporteur to: (a) promote the full realization of the right to food and the adoption of measures at the national, regional and international levels for the realization of the right to food; (b) examine ways and means of overcoming obstacles to the realization of the right to food; (c) continue mainstreaming a gender perspective and take into account an age dimension in the fulfilment of the mandate; (d) submit proposals that could help the realization of Millennium Development Goal 1; (e) present recommendations on possible steps towards achieving progressively the full realization of the right to food; (f) work in close cooperation with all States, intergovernmental and non-governmental organizations, the Committee on Economic, Social and Cultural Rights and other relevant actors to take fully into account the need to promote the effective realization of the right to food for all; and (g) continue participating in and contributing to relevant international conferences and events with the aim of promoting the realization of the right to food. The mandate of the Special Rapporteur was subsequently endorsed by the Council in resolutions 13/4 and 22/9, renewing the mandate for periods of three years.

2. On 8 May 2014, Hilal Elver (Turkey) was appointed by the Human Rights Council as Special Rapporteur on the right to food. She officially assumed her responsibilities as mandate holder on 2 June 2014. The Special Rapporteur wishes to take this opportunity to express her appreciation for the exceptional contribution of her predecessors, Olivier De Schutter (2008-2014) and Jean Ziegler (2000-2008), in advancing the mandate and promoting the realization of the right to adequate food. The Special Rapporteur intends to build on the work of her predecessors and further develop the important networks already established by them.

3. In the present report, her first to the General Assembly in accordance with Assembly resolution 68/177 and Human Rights Council resolution 6/2, the Special Rapporteur will outline some of the priorities she has identified for taking the mandate forward. Given the limited time frame between taking up office on 2 June 2014 and the submission of the present report, the Special Rapporteur notes that the issues identified hereafter are not exhaustive but rather provide a tentative description of her priorities for the mandate.

4. In setting out the mandate of the Special Rapporteur in resolution 6/2, the Human Rights Council encouraged close cooperation with all stakeholders, including non-State actors. Accordingly, during her first month in office, the Special Rapporteur held consultations on a preliminary and informal basis with representatives from the Office of the United Nations High Commissioner for Human Rights (OHCHR), academic experts and representatives of member States and civil society organizations based in Geneva. She also had occasion to meet with representatives from the Food and Agriculture Organization of the United Nations (FAO), including the Director-General, members of the senior management team and members of the team working on the right to food, as well as the Chair of the Committee on World Food Security and members of the Bureau and Advisory Group of the Committee. The Special Rapporteur wishes to express her gratitude to those with whom she met and appreciates their warm welcome. She is encouraged by the

dedication of many States, organizations and individuals working towards the eradication of hunger and the realization of the right to adequate food and she looks forward to cooperating with all stakeholders on issues relevant to her mandate over the coming years.

5. Since the establishment of the mandate in 2000, a number of important issues have been addressed by the Special Rapporteur's predecessors, including the impact of trade agreements, agroecology and alternative farming methods as a means of maintaining access to land. Legal, policy and institutional frameworks related to the right to food have also been analysed, with examples of best practice providing the basis of many of the recommendations made to States in relation to their obligation to protect the right to an adequate diet. The right of vulnerable groups to access adequate food has also been addressed by previous mandate holders, as has the impact of agriculture on climate change.

6. The global food crisis of 2008, which resulted in dramatic increases in food prices worldwide, provided the inaugural backdrop of the mandate of the previous Special Rapporteur. Given the circumstances at the time, when all major food commodities had reached their highest prices in nearly 50 years, he commenced his mandate by exploring the root causes of the crisis and advocated structural measures to prevent a recurrence of any future threats to food security (see A/HRC/9/23 and A/HRC/12/31).

7. While there have been significant developments in a number of countries in response to the crisis, concerns about price volatility remain, with the world economy showing little sign of stabilizing.[1] Indeed there has been a worrisome rise in local food prices in recent years. Additional steps must be taken at the global level to reduce the risk of future food crises resulting from rapid price increases. In this regard, the Special Rapporteur will continue to monitor the situation and urges States, both individually and collectively, to fulfil their legal obligation under human rights law to do their part in ensuring sustainable access to food for people.

II. Overview of the mandate

8. In its general comment No. 12 (1999) on the right to adequate food, the Committee on Economic, Social and Cultural Rights defined the necessary elements required for the right to food (i.e., the possibility either to feed oneself directly from productive land or other natural resources, or to purchase food) as follows: (a) availability; (b) accessibility; and (c) adequacy. Availability relates to the presence of sufficient food on the market to meet population needs. Accessibility refers to both physical and economic access: physical accessibility means that food should be accessible to all persons, including the physically vulnerable, such as children, older persons and persons with a disability; economic accessibility means that food should be affordable without compromising other basic needs, such as education, health care or housing. Adequacy requires that food satisfy dietary needs (factoring in a person's age, living conditions, health, occupation, sex and so on), be safe for human consumption, free of adverse substances, culturally acceptable and nutritious.

[1] Yilmaz Ayküz, "Waving or drowning: developing countries after the financial crisis", South Centre, research paper No. 48, June 2013.

9. At the international level, the right to food is recognized as a distinct and fundamental right in a number of international instruments. It was recognized in article 25 of the Universal Declaration of Human Rights and reaffirmed in the International Covenant on Economic, Social and Cultural Rights (article 11) and, through the right to life, in the International Covenant on Civil and Political Rights. It is also conferred in article 3 of the United Nations Declaration on the Rights of Indigenous Peoples. It is further recognized in the Convention on the Rights of the Child (articles 3, 24, para. 2 (c), and 27), the Convention on the Elimination of All Forms of Discrimination against Women (articles 12, para. 2, and 14) the International Convention on the Elimination of All Forms of Racial Discrimination (article 5 (e)) and the Convention on the Rights of Persons with Disabilities (articles 25 (f) and 28, para. 1).

10. The tenth anniversary of the adoption of the Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security is observed in 2014. The Voluntary Guidelines were developed as a practical tool for States to assist them in implementing their obligations under article 11 of the International Covenant on Economic, Social and Cultural Rights. They build on international law and complement the objectives set out in the Plan of Action of the 1996 World Food Summit. They also provide an additional instrument to accelerate attainment of the Millennium Development Goals and the post-2015 sustainable development goals. While the Voluntary Guidelines do not establish legally binding obligations for States or international organizations, Guideline 7 does, however, provide guidance on strengthening legal frameworks at the domestic level.

11. While there has been considerable legislative and judicial progress in many countries throughout the world since the adoption of the Voluntary Guidelines a decade ago, many challenges remain. In order to ensure the progressive realization of the right to food at the domestic level, it is imperative that constitutional principles and framework laws are established as a means of providing an appropriate institutional structure. The adoption of sectoral legislation will ensure that States adequately address various sectors that impact significantly on levels of food security.

12. It is in this context that the Special Rapporteur believes the international community should look to the future and establish what more can be done to ensure an enabling environment for people to access food in a dignified manner and to establish applicable remedies for those who are unable to do so. In his final report to the Human Rights Council in March 2014, the previous Special Rapporteur highlighted framework laws and national strategies in support of the realization of the right to food, highlighting a number of countries where examples of good practice exist. The Special Rapporteur intends to assess the experience of those countries and will examine the implementation of such laws at the national level, as a means of identifying possible models for other countries.

13. The Special Rapporteur believes that a key focus should now be placed on the implementation of those legal frameworks and policies to promote the right to adequate food for all. The Guidelines illustrate the significant impact of sectoral legislation through three examples: school feeding programmes, subsidies and transfers in cash or in kind for food security, food safety and consumer protection. The Special Rapporteur supports the implementation of such policies and believes

that regional, as well as North-South and South-South cooperation is essential for sharing best practices among States.

14. While in Rome in July 2014, the Special Rapporteur participated in an event organized by FAO to celebrate the tenth anniversary of the Voluntary Guidelines. The event provided her with the opportunity to participate in an interactive dialogue with government representatives, United Nations agencies and civil society in relation to the challenges facing all stakeholders in advancing the human rights approach to the progressive realization of the right to food. Despite institutional and normative developments over the last decade, eradicating hunger and ensuring access to adequate food has not been universally achieved. Frustration and disappointment were articulated by the representatives of both States and civil society at the event in Rome. The Committee on World Food Security will review the first decade of the implementation of the Voluntary Guidelines in October 2014 and States will be invited to comment on progress made, along with remaining challenges. The Special Rapporteur intends to contribute to that process.

III. Vision for the mandate

15. International human rights treaties and customary law principles oblige all States to protect persons living within their national territory, as well as people who are not the subject of any State sovereignty. The interdependence of international and national obligations in relation to human rights is enshrined in articles 22 and 23 of the International Covenant on Economic, Social and Cultural Rights and specifically expressed in article 11, paragraph 2, on the right to food. Moreover, the Human Rights Council, in resolution 7/14, considered that States should make every effort to ensure that their international policies of a political and economic nature, including international trade agreements, do not have a negative impact on the right to food in other countries.

16. It is the responsibility of all States, individually and through international cooperation and through international trade and investment policies and practices, to take the measures necessary to meet the vital food needs of their people, especially of vulnerable groups and households. It is, therefore, important to recognize the interdependency of food aid, trade liberalization in agriculture, intellectual property rights and agribusiness.

17. The Special Rapporteur will examine the impact of climate change and environmental degradation as a growing source of food shortages and food insecurity, particularly in countries that are faced with imminent risks due to economic, geographic and climatic conditions. In this context, she will also address the need to review international food systems, as a means of improving sustainable consumption and reducing food waste. In so doing, the Special Rapporteur will engage with the specific policy recommendations of the post-2015 sustainable development goals concerning the eradication of poverty and hunger, food security and the empowerment of women. The adoption of those goals is currently being negotiated by the United Nations, civil society and the relevant organizations with respect to their precise language.

18. The Special Rapporteur will put an emphasis on the key role played by women in ensuring food security, from production to consumption, by addressing gender gaps related to secure and equal access to assets and productive resources; analyse

the effects of unpaid work on women's right to food; and consider the need for mainstreaming gender concerns in legislative frameworks, programmes and policies related to food security and nutrition.

19. The first five years of a child's life are the most important in terms of human development and focus must be given to encouraging investment in future generations by providing healthy, adequate and nutritious food to young children. Ensuring food security, including a nutritious diet, makes a vital contribution to achieving a healthy society, both physically and mentally. The Special Rapporteur will make every effort to raise global awareness of the right of every child to enjoy the benefits of healthy, nutritious, sustainable food. That goal is especially relevant for societies faced with significant economic and climatic challenges.

20. The priorities identified by the Special Rapporteur are interrelated. It is not possible to develop a successful sustainable policy framework to eradicate hunger and provide adequate and nutritious food accessible to all without considering the specific requirements of women and children. It should be understood that the mandate encompasses issues relating to corporate responsibility with respect to global food policy and practices and linkages between private sector behaviour, food security and the right to food. The Special Rapporteur intends to address those issues in future reports. In so doing, she will coordinate her efforts with the relevant work being done by civil society and non-governmental organizations (NGOs).

IV. Substantive priorities

A. Justiciability of the right to food

21. While the right to food may once have been a controversial "positive" right, it is now enshrined in international law and States are obliged to ensure its progressive realization through ratification of international treaties and the development of supportive domestic and national legislation. However, many countries have failed to develop a judicial culture of recognition in practice, or the necessary legal frameworks required to ensure that the rights enshrined in the International Covenant on Economic, Social and Cultural Rights are justiciable. Accountability at both international and national levels is paramount to ensuring that the right to food and its correlative obligations are being implemented.

22. General comment No. 12 entails three levels of State obligation, including the obligation to respect, protect and fulfil (paras. 14 and 15). The obligation to respect requires States to refrain from adopting measures that prevent access to adequate food; the obligation to protect requires implementation or enforcement of regulations by States to ensure that third parties do not deprive people of their right to access adequate food; and the obligation to fulfil entails proactive steps to facilitate access to food and strengthen food security. Access to justice in relation to the right to food is also provided for in the recommendations in the Voluntary Guidelines that States should enshrine the right to food in their domestic law, including through the constitution, and provide suitable mechanisms for effective redress in the event of violations of the right to food.[2]

[2] See, FAO, "The right to food in practice: implementation at the national level" (2006) and Guidelines 7.1 and 7.2 of the Voluntary Guidelines.

23. Despite the scepticism that persists in a number of States, courts in several countries have been proactive in stepping in to prevent situations in which survival was threatened due to government inaction or inefficiency in realizing the right to food. The majority of cases relate to failures by authorities to provide minimum levels of subsistence for affected individuals or communities.[3] The right to food is now enshrined in the constitutions of more than 20 countries, together with legal provisions that allow for judicial protection by invoking the right to life, respect for human dignity, the right to health, the right to land, respect for ethnic and cultural rights, the right to housing and consumer rights.[4]

24. The entry into force of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights in May 2013, provided an additional remedial mechanism. It reinforces the justiciability of economic, social and cultural rights and places them on an equal footing with civil and political rights. The Optional Protocol is intended to complement rather than replace national legal systems and should not be considered as the principal means of seeking justice. It grants individuals, or groups of individuals under the jurisdiction of a State party, the right to submit communications about alleged violations of any economic, social or cultural right to the Committee on Economic, Social and Cultural Rights. Complaint procedures remind Governments of their responsibility to respect, protect and fulfil the right to adequate food.

25. The Special Rapporteur commends those States that have ratified the Optional Protocol and encourages others to do so as a matter of priority.[5] The Special Rapporteur intends to work closely with civil society to promote ratification and use of the Optional Protocol and bring violations to the attention of the Committee on Economic, Social and Cultural Rights as a means of eradicating hunger and promoting the right to adequate food. The Optional Protocol has the potential to contextualize and operationalize the right to food at international and national levels.

B. Women and the right to food

26. Although traditionally the role of women has been a part of the agenda on the right to food, the Special Rapporteur believes that the empowerment of women and the protection of their rights should be placed at the centre of the policymaking process on the right to food. Specific programmes and policies should be developed to empower women as agents of change. That means ensuring that they are granted equal access to resources, such as land ownership or tenure, water and seeds, and financial and technological assistance. The empowerment of women should not be limited to rural areas, but should also be extended to urban women, women from indigenous communities, those living in refugee camps and undocumented migrants. In the agricultural sector, policies tend to be "gender blind or gender sensitive in

[3] Christophe Golay, "The right to food and access to justice: examples at the national, regional and international levels" (FAO, 2009).

[4] Christian Courtis, "The right to food as a justiciable rights: challenges and strategies", *Revista Internacional de Direito e Cidadania*, No. 1, (June 2008).

[5] As at 16 July 2014, the following countries had ratified the Optional Protocol: Argentina, Belgium, Bolivia (Plurinational State of), Bosnia and Herzegovina, Cabo Verde, Ecuador, El Salvador, Finland, Gabon, Mongolia, Montenegro, Portugal, Slovakia, Spain and Uruguay.

mild ways", failing to address some of the main obstacles women face. Moving towards gender transformative policies will require major additional efforts on the part of States.[6]

27. Patriarchal norms often control the distribution of household resources, including food and income. As such, women and girls are often the last to receive food within the family setting. Such blatant discrimination can have a devastating effect on women's nutrition, which in turn leads to a reduction in learning potential and productivity and increases reproductive and maternal health risks. As a consequence, children are also severely affected. It is increasingly recognized that malnourished women are more likely to give birth to underweight children, resulting in stunting and other nutritional disorders.

28. In general, food and nutrition security policies continue to treat women primarily as mothers, focusing on the nutrition of infants and young children or pregnant women, rather than addressing constraints on women's economic and social participation. Teenage mothers, women without children and women of post-reproductive age with specific nutritional needs are generally not considered within those policies, and this must change.[6]

29. As farm labourers, vendors and unpaid care workers, women are responsible for food preparation and production in many countries and regions throughout the world and play a vital role in food security and nutrition. However, women and girls continue to be disproportionately affected by poverty and malnutrition. Women in rural areas are particularly affected, as female-headed households continue to grow, exceeding 30 per cent in some developing countries, with women owning only 2 per cent of agricultural land and with limited access to productive resources.[7] In many low-income countries, women are the backbone of the rural economy and 79 per cent of economically active women in the least developed countries consider agriculture as their primary source of income. Agrarian land reform legislation often discriminates against women by entitling only men over a certain age to land ownership while women's entitlement only applies in cases where they are household heads.[8] Such discriminatory practices prevent women in many countries from asserting their economic independence and being able to feed themselves and their families.

30. Investing in rural women has been shown to increase productivity significantly and reduce hunger and malnutrition.[8] According to FAO, women are responsible for 50 per cent of world food production, mainly for family consumption. The majority of rural women are "invisible" field workers on family plots. As a result, they have no recognized independent status as farmers and their work is considered as secondary both in the family and in society. In sub-Saharan Africa, only 15 per cent of landholders are women and they account for less than 10 per cent of credit and 7 per cent of extension services. According to estimates, policies that address gender inequalities could, conservatively, increase yields on women's farms by 2.5 to 4 per

[6] Marcela Villarreal, "The impact of gender inequalities on food security: what policies are needed?" paper presented at a colloquium at the University of Toulouse II-Le Mirail, 22-24 May 2012.

[7] FAO, "Women and the right to food, legal and state practice" (2008).

[8] Ibid., "The female face of farming", available from www.fao.org/gender/infographic/en/.

cent.[9] Those statistics emphasize women's key role in agriculture, not only in ensuring the well-being of individuals, families and rural communities, but also in relation to overall economic productivity and sustainable development.

31. Article 14 of the Convention on the All Forms of Elimination of Discrimination against Women should be used as a guiding tool by States. In the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security, endorsed by the Committee on World Food Security in May 2012, it is noted that gender equality is at the core of all reform efforts. The Voluntary Tenure Guidelines also contain special provisions for improving gender equality in both formal and customary systems, for instance through amending discriminatory inheritance and property laws. The Special Rapporteur will review State policies with reference to the Guidelines, highlighting examples of good practices that encourage access to land for women and other vulnerable groups.

32. Women in many parts of the world are confronted with other discriminatory policies and societal norms that prevent them from accessing their fundamental right to adequate food and nutrition. Limited access to education and adequate public health care, as well as early marriage and pregnancy, domestic violence and unequal employment opportunities impose restrictions on women's mobility, decision-making power and control over the family income.[10] Migration as a result of natural disasters, climate change and conflict has also had a disproportionate effect on women, particularly those living in rural areas and among the urban poor.

33. There is also a need for the new global development goals to address structural transformation in relation to the existing global systems of power, decision-making and resource-sharing as a means of achieving women's rights and gender equality in relation to food security. That includes enacting policies that recognize and redistribute the unequal and unfair burdens of women and girls in sustaining societal well-being and economies, which are intensified in times of economic and ecological crises.[11]

34. The fact that women are also considered as the primary caregivers, in both rural and urban settings, adds an extra dimension to their responsibilities within the household. While rural women often shoulder the burden of a heavy workload in addition to their care duties, urban poor woman face different challenges relating to assuring adequate food and nutrition for their family. For a range of economic reasons, poor urban women are increasingly relying on less nutritious processed foods. The Special Rapporteur intends to work with relevant stakeholders to address concerns related to the food issues facing different countries as a result of a dietary transition from traditional diets to processed foods high in fat and sugar, including the concerns addressed by her predecessor (see A/HRC/19/59).

[9] Ibid., "FAO at work 2010-2011. Women — key to food security", available from www.fao.org/docrep/014/am719e/am719e00.pdf.

[10] "What works for women: proven approaches for empowering women smallholders and achieving food security", joint NGO publication, 2012, available from http://www.care.org/sites/default/files/documents/CC-2012-What_Works_for_Women.pdf.

[11] Women's Major Group, "Gender equality, women's rights and women's priorities: recommendations for the proposed sustainable development goals and the post-2015 development agenda", September 2013.

35. States must recognize the need to accommodate the specific time and mobility constraints on women, given their role in the "care" economy, while at the same time reconstituting gender roles by adopting a transformative approach to employment and social protection (see A/HRC/22/50). The Special Rapporteur will endeavour to promote greater awareness of the guidance provided by general comments No. 16 (2005) on the equal right of men and women to the enjoyment of all economic, social and cultural rights and No. 20 (2009) on non-discrimination in economic, social and cultural rights of the Committee on Economic Social and Cultural Rights, which relate to discriminatory practices against women.

C. Children and the right to food

36. The first five years of life are the most important period of human development, with the first 1,000 days requiring special attention. Ensuring that a child receives adequate nutrition during that window of 1,000 days can have a profound impact on his or her ability to grow. It can also shape the long-term health, stability and prosperity of a society. Stunting, caused by chronic undernutrition early in a child's life, affects some 165 million children around the world. It was estimated that in 2011 more than one in every four children under five years of age in the developing world was stunted. Sub-Saharan Africa and South Asia are the two regions where stunting continues to be highly prevalent, with low-income countries experiencing the highest levels.[12] Undernutrition magnifies the effects of every disease, including measles and malaria, while malnutrition can also be caused by certain illnesses which reduce the ability of the body to convert food into usable nutrients.

37. Despite global efforts to eradicate child deaths due to malnutrition, more than 2 million children under age five die every year as a result of poor nutrition, and many of those deaths are associated with inappropriate feeding practices. Undernutrition among pregnant women in developing countries causes one out of six infants to be born with low birth weight, which is not only a risk factor for neonatal deaths, but may also lead to disability and learning difficulties.[13]

38. Although issues of undernutrition are often framed in terms of disability prevention, good nutrition is also vital for those who already live with a disability. Infants and children with disabilities suffer the same ill-effects of undernutrition as those without: poorer health outcomes; missing or delayed developmental milestones; avoidable secondary impairments; and, in extreme circumstances, premature death. The exclusion of children and adults with disabilities from nutritional outreach efforts on the basis of the incorrect belief that preserving the life of a child or adult with a disability is of lower priority than preserving the life of someone who is not disabled must be addressed by tackling such discriminatory social and cultural norms which advocate this.[14]

[12] UNICEF, *Improving Child Nutrition. The Achievable Imperative for Global Progress*, (United Nations Publication, Sales No. E.13.XX.4).

[13] World Health Organization, *Essential Nutrition Action: Improving Maternal, New-Born, Infant and Young Child Health and Nutrition*, (Geneva, 2013).

[14] Nora Groce and others, "Inclusive nutrition for children and adults with disabilities", *The Lancet Global Health*, vol. 1, No. 4 (October 2013).

39. Maintaining breast-feeding programmes, especially in countries experiencing the HIV epidemic poses a major challenge. The Special Rapporteur intends to coordinate with the United Nations Children's Fund the World Health Organization and other relevant stakeholders to help develop policies for strengthening specific programmes for young children. She also encourages States to fully implement the Global Strategy on Infant and Young Child Feeding, to position breastfeeding as the norm and to respect and promote community-based food sovereignty approaches to complementary feeding. The International Code of Marketing of Breast-milk Substitutes, adopted by the World Health Assembly at its thirty-fourth session in 1981 as a minimum requirement to protect and promote appropriate infant and young child feeding, should also be supplemented by further monitoring and regulation to ensure that companies responsible for the production of baby food follow similar quality control regulations for domestic use to those for export products.

40. In contrast to undernutrition, developed and middle-income countries, as well as the poorest countries of the world, are now faced with rising levels of chronic diseases related to obesity, including heart disease, diabetes and some cancers. Dietary changes associated with urbanization, such as increased consumption of sugars and fats and declining levels of physical activity, are largely to blame. Marketing campaigns employed by the food and beverage industry, targeting children and adolescents, also bear much of the responsibility.

41. A right-to-food approach requires that States fulfil their obligation to ensure that safe, nutritionally adequate and culturally acceptable food is available; they must also respect and protect consumers and promote good nutrition for all. The Voluntary Guidelines, in particular Guidelines 9, on food safety and consumer protection, and 10, on nutrition, can guide States in the establishment and maintenance of effective food and nutrition policies, thereby increasing the protection of the most vulnerable from unsafe food and inadequate diets, while helping to combat overweight and obesity. The Convention on the Rights of the Child indicates that access to adequate nutrition, including family support for optimal feeding practices, is a right that should be supported for every child. The Special Rapporteur believes that increased focus must be placed on mother and child nutrition as the core of a healthy start in life, with the correlation between infant and young child feeding and food security being treated as a priority in all global food and nutrition security programmes and with formal recognition at the international and national level, including in legal frameworks.

D. Climate change and the right to food

42. Climate change, sustainable resource management and food security are now widely considered among the most complex, interdependent and urgent global policy challenges. With average temperatures predicted by the world scientific community to rise by 2-4° C by the end of the century, the ability of entire regions to maintain current levels of agricultural production is being threatened and many of the adverse effects of climate change are now acutely felt. Individuals and communities already in vulnerable situations and at risk of discrimination due to

geography, poverty, gender, age, indigenous or minority status and disability are often disproportionately affected.[15]

43. Climate change is already having a significant impact on approximately 1 billion of the world's poor. In achieving the target set out in Millennium Development Goal 1, poverty rates have been halved, with 700 million fewer people living in extreme poverty in 2010 than in 1990. In the Human Development Report 2013, however, the United Nations Development Programme warns that if environmental degradation continues at the current rate, the gains in poverty reduction will be reversed, plunging over 3 billion people into extreme poverty and hunger. Without the implementation of serious measures to combat climate change, the number of people at risk of hunger is projected to increase by 10-20 per cent by 2050.[16]

44. The most recent report by the Intergovernmental Panel on Climate Change[16] suggests that climate change will "more likely than not" depress crop yields by more than 5 per cent by 2050. In addition, there is increased certainty about the effects of climate volatility on agricultural production and practices, with climate change shocks principally affecting smallholder agriculture, where the absence of crop insurance translates into adversity to risk. The report further acknowledges that climate change will have significant impacts on non-farm rural livelihoods, as well as tending to increase the risk of violent conflict when the availability of food and water is threatened.[17] FAO has noted that climate change affects the four dimensions of food security: availability, accessibility, utilization and food system stability. It will have an impact on human health, livelihood assets, food production and distribution channels, as well as influencing purchasing power and market flows.[18]

45. The threat posed by climate change to fresh water supplies, combined with the overuse of water in agriculture, is having a detrimental impact on food security. The consequent effects on food production are significant, putting the livelihoods of rural communities and the food security of city dwellers at risk. With the global population expected to increase to 9.5 billion by 2050,[19] the world's food calorie production will need to increase by 68 per cent in order to meet growing demand.

46. Climate change is not only impacting on food security but rising carbon dioxide emissions are causing harm to staple food crops, reducing their nutrient content for the 280 million malnourished people in the world.[20] A study by the Harvard School of Public Health estimates that 2 billion people suffer from zinc and

[15] *The Millennium Development Goals Report 2013*, available from www.un.org/millenniumgoals/pdf/report-2013/mdg-report-2013-english.pdf.

[16] Intergovernmental Panel on Climate Change, "Climate change 2014: impacts, adaptation and vulnerability", summary for policymakers of the contribution of Working Group II to the fifth assessment report of the Intergovernmental Panel on Climate Change, available from ipcc-wg2.gov/AR5/images/uploads/WG2AR5_SPM_FINAL.pdf.

[17] Bill Pritchard, Food Security and Climate Change: What Does the 5th IPCC Assessment Report Tell Us? http://sydney.edu.au/environment-institute/blog/food-security/.

[18] FAO, *Climate Change and Food Security: a Framework Document* (2008).

[19] Nikos Alexandratos and Jelle Bruinsma, *World Agriculture towards 2030/2050. The 2012 Revision*, (FAO, 2012).

[20] Economic Commission for Africa background paper, "The cost of hunger in Africa: social and economic impact of child undernutrition in Egypt, Ethiopia, Swaziland and Uganda" (E/ECA/COE/33/9 AU/CAMEF/EXP/9(IX)).

iron deficiencies, resulting in a loss of 63 million lives annually from malnutrition. Africa today has more children with stunted growth than it did 20 years ago, with up to 82 per cent of cases improperly treated. That poses a huge threat to the future of the continent and access to food rich in nutrients has become imperative.

47. The principle of "common but differentiated responsibilities", as specified in article 3 of the United Nations Framework Convention on Climate Change, is one of the innovative principles of international law that allows countries to participate in the responsibilities set out in the Convention to different degrees, depending on their developmental level. That principle should be used to inform future negotiations, especially in relation to countries facing severe threats to food security, while not directly responsible for climate change themselves.

48. In 2008, the Human Rights Council adopted its first resolution on human rights and climate change (resolution 7/23). As a result, OHCHR was requested to conduct an analytical study on the relationship between climate change and human rights (A/HRC/10/61). Subsequently, resolutions 10/4 and 18/22 were adopted in 2009 and 2011, in which the Council emphasized that climate change had a range of negative impacts on the human rights to life, adequate food, the highest attainable standard of health, adequate housing, self-determination, development and safe drinking water and sanitation.

49. International human rights law complements the Convention on Climate Change by emphasizing that international cooperation is a human rights obligation and that its central objective is safeguarding those rights. The Committee on Economic, Social and Cultural Rights notes that the right to adequate food requires the adoption of appropriate economic, environmental and social policies, and that the right to health extends to its underlying determinants, including a healthy environment.[21] Similarly, the OHCHR report on climate change and human rights mentioned above focuses on the direct relationship between the right to adequate food and climate change (paras. 25-30). Previous reports of the mandate holders have documented how extreme climate events are increasingly threatening livelihoods and food security (see, for example, A/HRC/7/5).

50. While it is beyond the scope of the present preliminary report to enter into the current debate on climate change policy, the Special Rapporteur wishes to note that she will focus on the adverse effects of climate change on the effective enjoyment of human rights (and particularly the right to food) as a cross-cutting theme in her mandate, consistent with Human Rights Council resolution 26/27 on human rights and climate change. In particular, the Special Rapporteur will focus on the impact of climate change on the right to food as it affects the most vulnerable groups in society and will analyse the gender dimensions of food security and nutrition in the context of climate change.

E. Global food loss and food waste

51. Approximately 1.3 billion tons, representing almost one third of world total food production for human consumption, is wasted per year. That is equivalent to

[21] See general comment No. 12, para. 4.

more than half of world annual cereal production.[22] Food waste varies significantly by country and region. In developing countries, food waste and losses principally occur during the early stages of the food value chain and can be traced back to constraints on harvesting techniques and deficient storage facilities. In developed countries, however, food is mainly wasted or lost at a later stage in the supply chain, with the behaviour of consumers having a significant impact.[23] In Europe and North America, for example, per capita food loss and waste amounts to 280-300 kg per year, whereas in sub-Saharan Africa and South and South-East Asia it amounts to 120–170 kg per year.[24] Food waste has a considerable environmental impact, with the vast amount of food going to landfills adding to global warming.[25]

52. The High-level Panel of Experts on Food Security and Nutrition of the Committee on World Food Security stresses the importance of reducing food waste.[24] The Special Rapporteur supports the call for the development of global protocols to measure food loss and waste, with due sensitivity to the large number of variables and national specificities, so as to improve the reliability, comparability and transparency of the data.

53. Innovative ideas for tackling food waste are needed. One of the goals established by the Zero Hunger Challenge, launched by the Secretary-General at the United Nations Conference on Sustainable Development, is to achieve zero loss or waste of food by minimizing the losses which occur during storage and transport by retailers and consumers; empowering consumer choice through appropriate labelling; encouraging commitment by producers, retailers and consumers of all nations; and achieving progress through financial incentives, collective pledges, locally relevant technologies and changed behaviour. While the challenge does not rely on legally binding obligations, it offers States an opportunity to review current policies in relation to food waste. Several constructive steps have been taken by some States to reduce food waste, including the Waste and Resources Action Programme sponsored by the Government of the United Kingdom of Great Britain and Northern Ireland that helps individuals, businesses and local authorities to reduce waste and recycle more. The Special Rapporteur plans to examine such examples of good practice and, during her official missions, will assess the degree of food waste in the countries concerned.

F. Right to food in emergency situations and armed conflict

54. The world is currently blighted by a plethora of humanitarian crises and armed conflicts, which are having a devastating impact on the lives of millions of people around the globe. While 19 per cent of the poorest people in the world now live in fragile and conflict-affected places, it is estimated that this will increase to 40 per cent by 2030 if current trends continue.[25] The international community must take greater responsibility for emergency food crises derived from natural or human-

[22] Jenny Gustavsson and others, "Global food losses and food waste: extent, causes and prevention", FAO (2011).

[23] United Nation Environment Programme, *The Environmental Crisis. The Environment's Role in Averting Future Food Crises* (2009).

[24] High-level Panel of Experts on Food Security and Nutrition of the Committee on World Food Security, "Food losses and waste in the context of sustainable food systems" (2014), available from www.fao.org/cfs/cfs-hlpe.

[25] World Bank, "Fragile and conflict-affected situations", issue brief, April 2014.

made disasters, global economic crises, climate change, or as a result of armed conflict.

55. International humanitarian law, which, inter alia, is designed to ensure that civilians and prisoners of war have adequate food and water during armed conflicts, also outlines preventive measures by prohibiting the deliberate starvation of civilians as a method of warfare in situations of both international and internal armed conflict. That prohibition is violated not only when access to food is denied, resulting in death, but also when the population goes hungry as a result of deprivation of food sources or supplies. In accordance with international criminal law, violations of such protection constitute war crimes. Deliberate starvation, whether during times of war or peace, may also constitute genocide or a crime against humanity. Implementation is always controversial in those situations, especially if the combat zone is limited to the territory of a single State. It should be noted that the right to food continues to be protected by international human rights law during times of armed conflict.

56. States are bound by treaties and customary human rights law and could be found legally responsible in the event of the deliberate destruction of international humanitarian aid or intentional blockage of access to food. International humanitarian organizations and NGOs also have a responsibility to distinguish humanitarian food aid in times of war from food aid in periods of peace and they should follow the principles of humanity, neutrality and impartiality in this regard. During her tenure, the Special Rapporteur intends to monitor situations of ongoing conflict and humanitarian crisis, particularly those where populations are experiencing acute vulnerability with respect to food security as a result of a humanitarian emergency or protracted conflict. Those currently experiencing such crises include the Democratic People's Republic of Korea, South Sudan, the Syrian Arab Republic and Gaza, among others.

57. There is a danger that emergency situations resulting from vulnerable livelihood systems (with their multiple underlying causes), such as natural disasters, climate change, violent conflict, occupation and insecurity, could become long-term, chronic crises. Key characteristics of such situations, which are defined by the Committee on World Food Security as "protracted crises" include severe malnutrition, high rates of food insecurity and vulnerable livelihood systems. The Committee is in the process of drafting a framework for action for addressing food insecurity and malnutrition in protracted crises. The Special Rapporteur hopes to contribute to the articulation of the principles for action in the framework and to promote the final document in discussions around the world.

G. Sustainable development goals and the right to food

58. With the Millennium Development Goals reaching their target date in 2015, the international community is currently reflecting on the progress made to date. The establishment of the Goals reflects the most significant collective effort ever made at the international level to tackle extreme poverty and hunger. While significant progress has been made over the past 14 years, much remains to be done. As mentioned above, the international community is discussing the possible successor framework in the form of the sustainable development goals, which are currently under negotiation.

59. The proposed sustainable development goals should adopt a rights-based approach and include mechanisms for establishing a transparent participatory process in decision-making, involving people directly affected by hunger, extreme poverty and injustice. Vulnerable groups, in particular, must be afforded the same rights as others in that process. Efforts must also be made to ensure that accountability mechanisms are in place to allow victims and organizations representing them to hold Governments to account for failure to comply with their international responsibilities in relation to the right to food. Women's equal access to land and resources should also be included, along with specific targets to ensure asset redistribution among different social groups in relation to the use of land, the oceans, credit, technology and intellectual and cultural property.

60. The Global Strategic Framework for Food Security and Nutrition of the Committee on World Food Security must also be used as a key reference tool for the implementation of effective models of governance concerning food, agriculture and nutrition for States, intergovernmental actors and the corporate private sector. Although it is not a legally binding document, it constitutes a commitment for countries to adopt its principles, options and policy base, as suited to their local needs and circumstances. The document includes provision for the rights of women and children in relation to food security and recognizes the central role played by smallholder farmers, agricultural workers, artisanal fisher folk, pastoralists and indigenous peoples. The primacy of food security and nutrition as a basic human right is the primary responsibility of the State and should be given priority over any other government policy.

V. Conclusions and recommendations

61. **The year 2014 is one of reflection for global food policymakers as they take stock of the progress made following the adoption of the Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security a decade ago. The Guidelines have provided a concrete tool with which to evaluate whether the principles set forth in human rights instruments and hortatory principles are having a practical impact on people's lives, especially the most vulnerable. The Special Rapporteur intends to work closely with FAO, the Committee on World Food Security and other relevant stakeholders to evaluate progress made to date, by taking into consideration examples of good practice as a means of promoting the Guidelines.**

62. **In order to advance the implementation of the right to adequate food, renewed political commitment is essential and stakeholders must look to those countries that have made significant progress in adopting policies and legislation in this regard. The post-2015 sustainable development goals should give priority to sustainability and the adoption of a vigorous human rights approach.**

63. **Non-discriminatory access to the resources required for sustainable food production, such as agricultural land, water, seeds, fertilizers and technical knowledge, must also be guaranteed. Support for small-scale family farmers and food producers should be paramount in the adoption of future policies related to food security and food sovereignty. Policy prescriptions that typically**

call for the expansion of industrial-scale agricultural development and ignore the real threats to global food supply (such as biofuel expansion, inadequate investment in climate-resilient agriculture, lagging support for small-scale farmers and women food producers and the massive loss of food to spoilage and waste) must be reconsidered. It is imperative that a human rights-based approach to food security is adopted in order to eliminate hunger and provide access to healthy, nutritious and affordable food for all. In that regard, the Special Rapporteur proposes to adopt a qualitative rather than quantitative approach to the right to food during her mandate, in response to the current challenges facing all States in developing national food policies.

64. The present report outlines some of the priorities identified by the Special Rapporteur as thematic areas of focus for her mandate. In accordance with its annual programme of work, the Special Rapporteur will present a more comprehensive report to the Human Rights Council in March 2015. Her first substantive report will examine one of the thematic issues outlined above in more depth. In the meantime the Special Rapporteur welcomes comments and feedback on the present report and looks forward to working with all stakeholders to advance the discussion on the human rights obligations related to the right to adequate food.

United Nations A/69/276

General Assembly

Distr.: General
7 August 2014

Original: English

Sixty-ninth session
Item 69 (b) of the provisional agenda*
Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms

Report of the United Nations High Commissioner for Human Rights on the right to privacy in the digital age

Note by the Secretariat

The present note is submitted pursuant to General Assembly resolution 68/167, in which the Assembly requested the United Nations High Commissioner for Human Rights to submit a report on the protection and promotion of the right to privacy in the context of domestic and extraterritorial surveillance and/or the interception of digital communications and the collection of personal data, including on a mass scale, to the Human Rights Council at its twenty-seventh session and to the Assembly at its sixty-ninth session, with views and recommendations, to be considered by Member States.

Pursuant to the above-mentioned request, the Secretariat refers the General Assembly to the report of the High Commissioner, submitted to the Human Rights Council, on the right to privacy in the digital age (A/HRC/27/37).

* A/69/150.

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